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IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-292

THE UTE INDIAN TRIBE,

Petitioner,

vs.

THE STATE TAX COMMISSION OF UTAH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, the Ute Indian Tribe, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 17, 1978, reversing and remanding the judgment of the United States District Court for the District of Utah dated February 25, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A. The Order denying the Petition for Rehearing, and the Findings of Fact, Conclusions of Law and Order rendered below by the United States District Court for the District of Utah also appear in Appendix A.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 17, 1978. A timely petition for re-hearing was denied on June 2, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the respondent Tax Commission has jurisdiction to impose Utah sales tax on sales by the Ute Tribe on trust lands and elsewhere in Utah, where the tax in question is a transaction tax, the incidence of which falls equally on both buyer and seller and where the tribe also has a valid sales tax ordinance taxing the identical sales by the tribe.

2. Whether the summary collection and enforcement procedures used against the Ute Tribe by the Tax Commission below, which included docketing a warrant against tribal trust property, constitute unreasonable interference with the internal affairs and right of self determination of the Tribe on its reservation.

3. Were the District Court's findings that the petitioner's federally recognized Indian reservation continues to exist within its original reservation boundaries clearly erroneous, as determined by the Court of Appeals, in light of the fact that such findings were supported by competent evidence received at trial, without opposing evidence being offered, and in light of the presumption of continued reservation existence absent clear, unambiguous proof to the contrary.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The case directly involves Article I, Section 8, Clause 3 of the Constitution of the United States; Article III, Constitution of Utah; the Utah Enabling Act (Act of July 16, 1894; 28 Stat. 107), Section 3; 25 U.S.C. § 476; 25 U.S.C. § 1322; and Title 59, Chapter 15, Utah Code Annotated (1953) Sections 2 (h), 4, 5, 8 and 11, all of which are printed in Appendix B.

STATEMENT OF THE CASE

Petitioner, the Ute Indian Tribe (herein referred to as the "Tribe" or "Ute Tribe"), is a federally recognized[1] American Indian Tribe exercising powers of self-government[2] on the Uintah and Ouray Indian Reservation in the State of Utah.[3] The Ute Tribe has never, by agreement or otherwise,[4] submitted to the jurisdiction of the State of Utah pursuant to 25 U.S.C. § 1321 et seq., for the purposes of taxation or otherwise.[5]

Utefab, Ltd., at all times relevant herein, was a wholly-owned economic enterprise of the Ute Tribe established to provide employment for, and develop work skills in, members of the Tribe. It was engaged in the business of producing cabinetry and millwork at its plant on trust lands on the Uintah and Ouray Reservation.[6]

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[1]App. A, Finding of Fact No. 4.

[2]App. A, Finding of Fact Nos. 6 and 7.

[3]App. A, Finding of Fact Nos. 5 and 6.

[4]See 25 U.S.C. §1321 et seq.; *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

[5]App. A, Finding of Fact No. 9.

[6]App. A, Finding of Fact No. 10.

The Ute Tribe is organized[7] under a tribal Constitution and Bylaws[8] which establish a Tribal Business Committee empowered, *inter alia,* to promulgate and enforce tax ordinances, to levy taxes and license fees within its reservation, and to regulate trade upon the reservation.[9]

The Ute Tribe's Tribal Business Committee adopted an ordinance, effective January 1, 1974, which provides for the taxation of sales to or by Indians within the exterior boundaries of the Tribe's reservation[10] Prior to that time, Utefab had collected Utah sales taxes and had prepared and filed Utah sales tax returns with respondent State Tax Commission of the State of Utah (herein referred to as the "Tax Commission" or the "Commission"), for sales occurring during the period January 1, 1971, through December 31, 1973. Such sales were made at the tribal plant on trust land within the reservation to both Indian and non-Indian purchasers with delivery taken both on trust and non-trust lands within the Tribe's reservation, as well as outside of the reservation.[11]

In March of 1974, the Tribe made demand upon the Tax Commission for the return of said sales tax remittances by means of a formal application and claim for a refund. The Tax Commission refused to refund any of the money so collected.[12] While such claim for a refund was pending the Tax Commission docketed a warrant for delinquent sales tax remittances against the Tribe

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[7]See 25 U.S.C. §476.

[8]App. A, Finding of Fact Nos. 6 and 7.

[9]App. A, Finding of Fact No. 7.

[10]App. A, Finding of Fact No. 8.

[11]App. A, Finding of Fact Nos. 11, 12 and 13.

[12]App. A, Finding of Fact No. 16.

and its real and personal property.[13] Under Utah law,[14] such a warrant has the legal effect of an execution upon the personal property of the Tribe and becomes a lien in the nature of a docketed judgment upon the real property of the Tribe, all of which real property is held in trust for the Tribe by the United States of America.[15]

Following the docketing of said warrant against the Tribe and its real and personal property, the Tribe instituted this action for declaratory and injunctive relief against the Tax Commission and for the return of the State sales tax proceeds remitted by the Tribe to the Tax Commission. Sometime after the filing of a complaint in the Utah Federal District Court, the Tax Commission released the warrant.[16] Jurisdiction in the District Court was predicated upon 28 U.S.C. § 1331 (Federal Question) and 28 U.S.C. § 1362 (Actions by Indian Tribes.)[17]

Following trial to the court without a jury, the District Court made extensive Findings of Fact and Conclusions of Law[18] and, based thereon, determined, *inter alia,* that the Tribe's tax ordinance was valid. The District Court further enjoined the Tax Commission from collecting sales and use taxes on sales by the Ute Tribe or by or to Indians within the Ute Tribe's reservation and ordered certain Utah sales tax proceeds collected and paid by Utefab refunded to the Tribe.

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[13]App. A, Finding of Fact No. 17.

[14]§ 59-15-11, U.C.A., 1953, appended hereto as part of Appendix B.

[15]App. A, Finding of Fact No. 18; See Appendix B § 59-15-11 U.S.C. 1953. Congress has expressly provided for the continuation of Federal Restrictions on the property of the Ute Indian Tribe. See 25 U.S.C. § 677 et seq.

[16]App. A, Finding of Fact Nos. 1, 2, 3 and 19.

[17]See *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976).

[18]Appendix A.

Following entry of this judgment, the Tax Commission sought to reopen the case to challenge the District Court's findings regarding the boundaries and status of the Tribe's reservation and for the first time, to present evidence in relation thereto. All such motions were denied by the District Court, following which the Tax Commission perfected an appeal to the Court of Appeals for the Tenth Circuit.

In connection with its appeal, the Tax Commission attempted to supplement the trial court record by submitting hundreds of pages of documents purporting to bear on the issue of the present status of the Ute Tribe's Uintah and Ouray Reservation. The Court of Appeals refused to receive such documents, but in its decision[19] determined that the findings by the District Court as to reservation boundaries and the extent of the trust lands were "clearly erroneous."

As to the remainder of the District Court's findings, the Court of Appeals affirmed the jurisdiction of the District Court over the proceedings, affirmed the findings regarding lack of State power to tax sales by Indians to Indians, but reversed the District Court's findings regarding the nature of the Utah sales tax, the right of the Tribe to a refund for moneys paid to the State prior to 1974, and decreed that, under the holding of *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976), the Utah sales tax was applicable to sales by the Tribe's commercial enterprise (Utefab) to non-Indians on trust lands. No mention is made in the opinion either of the Ute Tribe's own taxing ordinance or of the effect of the Tax Commission's enforcement warrant on the trust property of the Tribe. The case was thereupon "Reversed and Remanded for further proceedings" consistent with the opinion.

[19]Appendix A.

This Petition follows the refusal of the Court of Appeals to grant a rehearing.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals below sanctions interference by a state with the internal affairs and right of self determination of a federally recognized Indian Tribe on its reservation and is in direct conflict with prior decisions of this Court in this regard. *Bryan v. Itasca County,* 426 U.S. 373 (1976); cf. *United States v. Wheeler,* 46 U.S.L. Week 4243, (U.S. March 22, 1978); *Santa Clara Pueblo v. Martinez,* 46 U.S.L. Week 4412 (U.S. May 15, 1978).

Petitioner believes that the central question of "whether the state action infringed on the right of reservation Indians to make their own laws and to be ruled by them" has been decided below in a manner inconsistent with *Williams v. Lee,* 358 U.S. 217 (1959) and *McClanahan v. State Tax Commission,* 411 U.S. 164 (1973).

The Court of Appeals, while acknowledging "a preemption of State taxing authority by federal legislation," completely ignores both the existence of the Tribe's sales tax on sales to or by Indians within the reservation and the summary collection procedures used by the Tax Commission to enforce jurisdiction over the Tribe. It further holds that "sales not on trust lands by the Tribe to Indians only are not within the state taxing power."

As this factual matter, i.e. sales to Indians only outside the reservation was not ever before the Court below,

the "holding" only serves to obscure the real issues of interference with tribal self-determination.

The effect of the decision is that sales by the Tribe on trust lands to non-Indians are subject to two taxes. The Tribe must either repeal its tax or suffer the competitive disadvantage of requiring purchasers of its goods on the reservation to pay a double tax. The decision further denies the Tribe the right to regulate commerce with its own members within its reservation where either fee lands or non-Indians are involved.

2. The decision below stands for the proposition that the only Indian related sales which are not subject to state jurisdiction are those on trust lands between Indians. As such it contradicts decisions of this Court relating to Indian Traders and Indian Country. See *Warren Trading Post v. Arizona Tax Commission,* 380 U.S. 685 (1965).

This Court on several occasions has considered the propriety of state tax jurisdiction on Indian Reservations. Where the incidence of the tax sought to be imposed falls directly upon an Indian or an Indian Tribe, the tax has been found to be an impermissible burden on "Commerce . . . with the Indian Tribes." *Warren Trading Post v. Arizona Tax Commission, Supra.; McClanahan v. State Tax Commission, Supra.;* cf. 25 U.S.C. § 261.

One of the most recent cases to consider this issue was *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976). There the pivotal jurisdictional issue was the incidence of the tax. Construing a Montana Statute which conclusively presumed the tax to be on the non-Indian consumer, the Court ruled that the state could impose a minimal collection burden on Indian retailers designed to avoid the likelihood that non-Indians purchasing from tribal sellers would avoid the payment of a lawful tax.

However in *Moe,* this Court expressly declined to express an opinion on the "complicated problems" of enforcement of state jurisdiction over Indian sellers. 425 U.S. at p. 467 n. 6. The Appellate Court below ignored the fact that this action resulted only after the Utah Tax Commission asserted jurisdiction over the Ute Tribe by docketing a warrant against all of its real and personal property.

The enforcement problems contemplated in *Moe* were before the Court of Appeals. It resolved them by disregarding the requirement established by 25 U.S.C. § 1326 and *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971), that tribal consent be given as a precondition to the assumption of state jurisdiction. The opinion below reversed the trial court's decision condemning such collection procedures, and by inference authorizes the imposition of state tax jurisdiction on Indian Tribes under threat of execution and sale of tribal property.

Petitioner believes that the decision below is inconsistent and in conflict with decisions of this Court in these regards.

3. The decision below is in conflict with established congressional policies relating to Indian taxation.

This Court has recently reaffirmed that "Congress has plenary authority to legislate for the Indian Tribes in all matters,. . ." *United States v. Wheeler,* 46 U.S.L. Week 4243 (U.S. March 22, 1978). Congress, in exercising this power has legislated both generally and specifically in terms which conflict with the Court of Appeals'

finding that the Ute Tribe is subject to the jurisdiction of the Utah Tax Commission both for purposes of sales tax liability and enforcement of such taxes. In general terms, the stated Congressional policies of both the Indian Self-Determination Act of 1975 (25 U.S.C. § 450 et seq., especially § 450(a) "Congressional Declaration of Policy") and the Indian Financing Act of 1974 (25 U.S.C. § 1451 et seq., especially § 1451 "Congressional Declaration of Policy") are but recent reaffirmations of "the well-established federal policy of furthering Indian self-government" (*Santa Clara Pueblo v. Martinez,* 46 U.S.L. Week 4412 (U.S. May 15, 1978).

In failing to consider the effect of the Tax Commission's taxing powers and collection procedures on the Ute Tribe herein, the Court of Appeals has run afoul of the several federal statutes which expressly deny such power to the State of Utah. These include:

(1) 25 U.S.C. § 476 (Section 16 of the Indian Reorganization Act of 1934) which vested in the Ute Tribe (pursuant to the adoption of its Tribal Constitution) the power "to prevent the sale, disposition, lease, *or encumbrance* of tribal lands, or other tribal assets without the consent of the Tribe." (emphasis added). This Court has previously noted that, "The [Indian] Reorganization Act did not strip Indian tribes and their reservation lands of their historic immunity from state and local control." *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 153 (1973).

(2) 25 U.S.C. § 1322(b) which, even if the state of Utah had otherwise assumed jurisdiction over the Ute Tribe, which it has not, would have prevented the state from attempting any "alienation, *encumbrance, or taxation* of any real or personal property . . . belonging to any Indian or Indian tribe." (emphasis added).

(3) The Utah Enabling Act of July 16, 1894 (28 Stat. 107) (See Appendix B herein) which provides that,

> The people inhabiting said proposed state do agree that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes . . . and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . (Section 3).

This provision is carried forth and incorporated into the Utah Constitution. See Article III, Paragraph "Second."

25 U.S.C. § 476 is important also because it specifically confirmed in Indian tribes "all powers vested in any Indian tribe or tribal council by existing law." Shortly after this language was adopted by Congress in 1934, the Solicitor of the Department of the Interior issued an opinion identifying and defining such "powers." This opinion, entitled "Powers of Indian Tribes," 55 I.D. 14 (1934), under the sub-heading "The Taxing Power of an Indian Tribe," states as follows:

> Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe and over non-members, so far as such non-members may accept privileges of trade, residence, etc., to which taxes may be attached as conditions. (55 I.D. at 46).

This opinion has been recently cited by this Court as identifying such powers. See *United States v. Wheeler, supra.,* n. 27.

Petitioner submits that substantial questions, critical to every Indian Tribe seeking economic self-determination, exist as a result of these general and specific congressional

pronouncements and the opinion of the Court of Appeals imposing Utah sales taxes and enforcement procedures on the Ute Tribe.

(4) The Court of Appeals reversed the finding of the Chief Judge of the District of Utah as to the incidence and nature of the Utah Tax and held that "The Utah sales tax . . . places a tax on the purchaser of tangible personal property . . ."

Petitioner respectfully submits that numerous decisions of the Utah Supreme Court, together with the language of the Utah Sales Tax Act itself, contradict this conclusion.

The Utah tax in question is "[a] tax upon every retail sale of tangible personal property made within the State of Utah. . ." § 59-15-4 U.C.A. (1953) (See Appendix B for all cited provisions of the Utah Code Annotated). Vendors receiving consideration upon a sale of tangible property or service "are responsible for the collection of the amount of the tax imposed on [the] sale." § 59-15-5 U.C.A. (1953). "The word 'tax' means . . . the aggregate amount of taxes due from the vendor . . . during the period for which he is required to report his collections. . ." § 59-15-2(h) U.C.A. (1953).

The vendor is required to collect the tax from the vendee, file quarterly returns and remit taxes on total sales during the reporting period. § 59-15-5 U.C.A. (1953). Failure to do so subjects the vendor to absolute liability for the tax, criminal sanctions, penalties, and interest.

Section 59-15-11, U.C.A., (1953), dealing with subject of "Collection of Tax by Warrant" states as follows:

> A tax due and unpaid under this act shall constitute *a debt due the state from the vendor* and may be collected, together with interest, penalty and costs, by appropriate judicial proceeding. . . . (emphasis added)

Since shortly after passage of the Utah sales tax law in 1933, the Utah Supreme Court held that,

> The Sales Tax Act *imposes the tax on the transaction.* The amount of consideration involved in the sale or transaction (a sale always involves a purchase) is the measure to which the rate is applied.
>
> • • •
>
> The vendor or the person receiving the payment or consideration upon a sale is charged under the law with the responsibility of collecting or accounting to the[20] State for the tax imposed. (emphasis added)

That the burden or incidence of the Utah sales tax falls on sellers as well as buyers is emphasized by the following:

> It is the duty of the vendor to collect the tax from vendees who are "consumers" and to remit the same with proper records to the Tax Commission. [Citing what is now § 59-15-5, U.C.A., (1953)] However, the last cited section of the code makes the vendor to consumers liable for the sales tax regardless of whether or not said vendor collects said tax from the vendee.[21]

That the vendor is a "taxpayer" under the Utah law is reaffirmed by the following:

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[20] *W. F. Jensen Candy Co. v. State Tax Commission*, 90 Utah 359, 61 P.2d 629, 630-1 (1936). See also *Union Stock Yards v. State Tax Commission of* Utah, 93 Utah 174, 71 P.2d 542 (1937).

[21] *E. C. Olsen Co. v. State Tax Commission*, 109 Utah 563, 168 P.2d 324, 326-7 (1946).

> First we must clarify that the sales tax is imposed upon all *sales* of tangible personal property where passage of title and delivery occur within the State of Utah. . . . One need not be "retailer" to be taxed. *Either retailers or wholesalers are taxed if the sale is to the consumer or user.* (First emphasis in original; second added.)[22]

Further, Section 59-15-11, U.C.A., (1953), specifically refers to the party against whom the State's collection warrant is issued as "the delinquent taxpayer."

The clear error of the Circuit Court in reversing the District Court's finding that the Ute Tribe is entitled to the refund is manifest in Section 59-15-8 of the Utah statute dealing with "Overpayments and deficiencies," which provides:

> If the amount paid exceeds that which is due, the excess, . . . shall be credited or refunded *to the person paying it* upon written application therefor. If the commission determines that any amount . . . has been erroneously or illegally collected or computed, the commission shall certify to the State auditor the amount collected is excess of what was legally due, *from whom it was collected or by whom paid to the Commission . . . and the balance shall be refunded to that person* . . . .

The importance of further review of this issue by this Court is not limited to whether or not the Tribe gets the refund, but is demonstrated by the emphasis in the *Moe* decision that the tax considered therein was solely a tax on the non-Indian customer and not a tax on the reservation Indian himself. If in fact the burden of the Utah sales tax is on the Indian vendor (the Ute Tribe

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[22] *Ogden Union Railway and Depot Co. v. State Tax Commission,* 16 Utah 2d 23, 395 P2d 57, 59-60 (1964).

herein), on the reservation, as the District Court found, then state enforcement of the tax herein should be precluded by such decisions of this Court as *Mescalero Apache Tribe v. Jones,*[23] *McClanahan v. Arizona Tax Commission,*[24] and, recently, *Bryan v. Itasca County.*[25]

(5) The Court of Appeals below departed from the standard of review in Indian reservation status cases by reversing and remanding the District Court's findings relative to petitioners' reservation.

The case was presented to the District Court on largely stipulated facts. The parties agreed for the purposes of this case that the reservation existed and that sales took place within and without the reservation. No contradictory evidence was offered at trial. No significant objection was raised by the Tax Commission to the District Court's findings and decision which incorporated the parties' stipulations and other testimony concerning these issues.

For the first time on appeal below, the Tax Commission proffered voluminous exhibits as a proposed appendix to its brief purporting to evidence what it claimed was congressional intent to disestablish the Uintah and Ouray reservation. The Court of Appeals refused to accept the exhibits, but nevertheless stated that the issue of "the boundaries of the reservation or what might constitute trust lands" was "not the subject to a stipulation binding on the Court in any manner. The finding by the Trial Court as to the reservation boundaries or as to trust lands was clearly erroneous."

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[23] 411 U.S. 145 (1973).

[24] 411 U.S. 164 (1973).

[25] 425 U.S. 373 (1976).

Petitioner believes that the Appellate Court acted inappropriately and in conflict with decisions of this Court when it refused to accept the stipulated record of the Trial Court. The case of *H. Hackford & Co. v. United States,* 197 U.S. 442 (1905), involved a stipulation of ultimate facts which the Court of Appeals concluded was not binding.

This Court then stated:

> "We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record were established no less than the specific facts recited." (Ibid. P. 447). See also *Kelley v. Rhodes,* 188 U.S. 1 (1902).

The Tribe submits that for the Court of Appeals to find the record below lacking in "evidence or basis" and consequently clearly "erroneous" is a fundamental breach of that Court's appellate responsibility, meriting plenary review by this Court

In response to the District Court's findings regarding the status and extent of petitioner's reservation, the Court of Appeals stated:

> We are unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands. The issue was not litigated apparently due to a misunderstanding as to a provision of the pretrial order. . . . The finding by the trial court as to the reservation boundaries or as to trust lands was clearly erroneous.

This pronouncement by the Court of Appeals ignores the pleadings, admissions, pre-trial order and stipulations

before the District Court. It further disregards testimony and exhibits received from the United States Bureau of Indian Affairs Realty Officer for petitioner's reservation as to the location of the original reservation boundaries.[26]

Even in its Reply Brief filed with the Court of Appeals, the Tax Commission concluded that "it is fair to say a 'reservation' consisting only of the present trust lands . . . continued even after 1905."[27]

The Commission further contended in the same brief:

> "The original Uintah Reservation and the original Uncompahgre Reservation were disestablished by acts of Congress, *and the present Uintah and Ouray Reservation occupies an area smaller than contained in the two former reservations.*" (emphasis added)[28]

All of the evidence below was to the effect that the Ute Tribe has a reservation, that sales took place from trust lands on that reservation to buyers on trust lands, on private lands within the original boundaries of the reservation and outside those boundaries altogether. The Tribe claimed all of these sales were exempt from Utah tax jurisdiction. The Commission took a contrary view. The Trial Court agreed with the Tribe.

An issue which was not litigated was the Tax Commission's belated assertion that the Tribe's reservation had been disestablished or diminished, but this claim was

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[26]Trial Transcript Feb. 11, 1976 pp. 37-49.

[27]Reply Brief of the State of Utah, P. 13.

[28]Reply Brief of the State of Utah, P. 13. The Commission by these concessions apparently abandoned its claim that the Tribe's present reservation was disestablished.

never made *until after the trial* in the District Court, by pleadings or otherwise.

The Court of Appeals apparently determined that this was a threshold question which should have been tried in the District Court and remanded the case for this purpose. Petitioner believes this conclusion to be erroneous for two reasons.

First, as long as there is no dispute regarding the fact that sales by the Tribe were made from trust lands, there was ample evidence and precedent for the District Court to find that the Commission had no jurisdiction over the Tribe for purposes of these sales in this case. In such circumstances the issue of diminishment of the Tribe's reservation is immaterial to the resolution of any questions of state jurisdiction over the Tribe. Further, as the existence of the tribe, and a valid tribal tax ordinance were undisputed, the question of the right of the tribe to impose a sales tax on sales by its tribal enterprise on trust lands to buyers anywhere would appear unaffected by any diminishment issue sought to be raised by the Tax Commission.

Second, as the burden of proving reservation diminishment or disestablishment has always been on the proponent of such a contention, the Tax Commission's burden below was to show a clearly expressed congressional intent to disestablish or diminish, absent which showing, this Court requires all reasonable ambiguities to be resolved in favor of the Indians and in favor of continued reservation existence. See *DeCoteau v. District County Court,* 420 U.S. 425, 444-447 (1975).

The Court of Appeals has not only disregarded the record before it, but has apparently reversed the long standing presumptions regarding reservation status and

the burden of proving reservation disestablishment. A further review of this matter is appropriate to affirm the proper judicial standard of review applicable to such a case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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Appendix

APPENDIX A

OPINIONS AND JUDGMENT BELOW

I. FINDINGS, CONCLUSIONS AND ORDER OF THE UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. C 74-183

THE UTE INDIAN TRIBE,

Plaintiff,

vs.

STATE TAX COMMISSION OF THE STATE OF UTAH,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came on regularly for trial on the 11th day of February, 1976, upon the Amended Complaint of the plaintiff for declaratory judgment, injunctive relief and return of taxes alleged to have been improperly collected, and the plaintiff, The Ute Indian Tribe, appearing by and through its counsel, F. Burton Howard, and defendant, State Tax Commission of the State of Utah, appearing by and through its counsel, G. Blaine Davis, and the Court having heard the evidence and having considered the pleadings and the exhibits admitted into evidence, and after argument of counsel, the Court hereby makes the following

FINDINGS OF FACT

1. This is an action in four counts for declaratory relief declaring that sales and use taxes on sales by the Ute Indian Tribe and its tribal enterprise, Ute Fab, Ltd., as levied by the defendant are illegal and invalid, and further declaring that the defendant has no jurisdiction to levy or collect sales or use taxes or otherwise interfere with the commercial activities of the plaintiff on the Uintah and Ouray Indian Reservation.

2. Plaintiff in this action further seeks declaratory relief that a judgment warrant docketed against properties held in trust for the plaintiff by the United States of America is void and that plaintiff's tax ordinance is valid and effective within the exterior boundaries of the Reservation.

3. The action further requests an order compelling the return of monies erroneously forwarded by the plaintiff to the defendant and enjoining and restraining further levy and collection of sales and use taxes or further docketing warrants to effect the collection of the same against the Tribe.

4. Plaintiff is a sovereign American Indian Tribe organized pursuant to Act of Congress of June 18, 1934, (48 Stat. 984), 25 U.S.C. § 761, et seq., as amended, with its governing body duly recognized by the Secretary of the Interior, and its existence is within Federal jurisdiction and is governed by the laws of the United States. In such capacity plaintiff is an instrumentality of the United States.

5. The Uintah and Ouray Reservation was created and exists and its boundaries established under and pursuant to Executive Orders of October 3, 1861 and January

5, 1882 and Acts of Congress of May 5, 1864, (13 Stat. 63) and March 11, 1948 (62 Stat. 72) and the laws of the United States.

6. Pursuant to Act of Congress of June 18, 1934 (48 Stat. 984), plaintiff adopted its Constitution and By-Laws confirming and extending plaintiff's jurisdiction to the territory within the exterior boundaries of the Uintah and Ouray Reservation as set forth by the above mentioned Executive Orders and Acts of Congress.

7. Plaintiff's Constitution further empowers plaintiff's Tribal Business Committee to promulgate and enforce tax ordinances, to levy taxes and license fees upon non-members doing business within the Reservation, and to regulate trade upon the Reservation.

8. Plaintiff, through its governing body, the Tribal Business Committee, duly adopted an ordinance effective January 1, 1974, which provides for the taxation of sales to or by Indians within the exterior boundaries of its Reservation. Defendant also levied and attempted to collect sales taxes on sales by the plaintiff during the first quarter of 1974.

9. Plaintiff at no time, by agreement or otherwise, has submitted to the jurisdiction of or ceded jurisdiction to the State of Utah or to the State Tax Commission to levy or collect sales or use taxes on sales to or by Indians on the Uintah and Ouray Reservation nor has there been any enactment by Congress providing that Utah law shall apply to such sales.

10. Plaintiff, acting through its tribal enterprise, Ute Fab, Ltd., for the purpose of developing skills of tribal members and assisting in the attainment of eco-

nomic self-sufficiency for the Ute Indian Tribe, makes, sells and distributes personal property of various kinds, including cabinets, millwork, wood products, furniture and associated hardware and tools from its plant on the Uintah and Ouray Reservation.

11. Said personal property was sold by the plaintiff and delivery was taken by purchasers from the plaintiff at three general areas, to-wit:

A. Plaintiff's plant at the Tribal Headquarters on lands originally received as part of the original Uintah and Ouray Indian Reservation and administered by the Bureau of Indian Affairs as trust lands.

B. Lands within the present exterior boundary of the Reservation which were originally part of the Uintah and Ouray Indian Reservation but are presently owned in fee by other individuals primarily non-Indians.

C. Lands outside the exterior boundaries of the Reservation which are not now and never have been part of the Uintah and Ouray Indian Reservation.

12. That during the period January 1, 1971, through December 31, 1973, plaintiff prepared and filed sales tax returns and reported sales to the defendant as follows:

A. Sales made from plaintiff's plant at the Tribal Headquarters where delivery was taken on trust lands maintained as part of the Uintah and Ouray Indian Reservation, $132,140.61.

B. Sales made from plaintiff's plant at the Tribal Headquarters and delivered by plaintiff in plaintiff's vehicles within the present exterior boundaries of the Reservation to purchasers primarily non-Indians on lands

owned in fee and not administered as trust lands by the Bureau of Indian Affairs, $3,915.42.

C. Sales made from plaintiff's plant at the Tribal Headquarters and delivered by plaintiff in plaintiff's vehicles to purchasers outside of the present exterior boundaries of the Reservation, $211,465.85.

13. In the course of making the aforesaid sales, plaintiff collected from all of its purchasers a sales tax at the rate of 4½% and inadvertently and erroneously forwarded said sales tax to the defendant Tax Commission.

14. The total amount of money forwarded to the Tax Commission pursuant to said sales tax returns was $15,430.33.

15. The portion of the $15,430.33 attributable to each of the aforesaid areas is as follows:

A. $5,737.02

B. $ 177.36

C. $9,515.95

16. In March of 1974 plaintiff made demand of defendant for return of the $15,430.33 and filed a formal application and claim for refund in an administrative proceeding with defendant Tax Commission. Defendant refused to return any part of those monies.

17. On May 22, 1974, prior to any hearing or decision by the Tax Commission, defendant docketed a warrant for delinquent sales tax for the period January 1, 1974, through March 31, 1974, against the plaintiff and its real or personal property.

18. Section 59-15-11 and Section 59-16-15, U.C.A., 1953, the Utah statutes which authorized this warrant, purport to authorize a lien upon the real property of the plaintiff, i.e., trust property, the legal owner of which is the United States of America and which is administered by the Bureau of Indian Affairs for the plaintiff, and further direct the County Sheriff of the County where the property is located to levy upon and sell the real and personal property of the plaintiff to satisfy the delinquent tax. These statutes also purport to have the force and effect of an execution against all personal property of the plaintiff and to create a lien upon the real property of the United States of America, in the same manner as a docketed judgment.

19. Plaintiff thereupon sought relief in this Court and filed its Complaint herein; sometime after the filing of the Complaint, defendant released the warrant.

20. After the filing of the Complaint, the defendant continued to audit the plaintiff's business activities and requested that the plaintiff appear at administrative hearings to determine additional sales tax liability on sales unrelated to the Complaint herein.

21. In an additional claim for refund of sales taxes filed with the defendant in March of 1974 by an enrolled member of plaintiff's Tribe requesting relief from the State sales tax imposed on the purchase of a trailer home where delivery was taken upon plaintiff's Reservation on trust lands, the defendant failed to respond and refused to grant a hearing on such claim and has continued to fail and refuse to apply applicable law and render a decision regarding whether said purchase was exempt from Utah sales taxes.

22. In addition, the defendant has continued to require the Tribe to pay sales and use taxes on purchases of property for the use and benefit of the Tribe during the pendency of this action.

23. Throughout the pendency of this matter, defendant has continued to attempt to collect sales and use taxes from the plaintiff and under Utah law will continue to levy and collect such taxes from the plaintiff in the future by the docketing of warrants or otherwise unless restrained by this Court.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of the Complaint.

2. A justiciable controversy exists between the parties herein.

3. The plaintiff is the real party in interest and has standing to bring this action.

4. By Act of Congress of April 11, 1968, (82 Stat. 78, 79) 25 U.S.C. §§ 1321 and 1322, the United States has given its consent to the States to assume jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country within a state on the condition that the affected tribe consents to such jurisdiction. This Act further prohibits the alienation, encumbrance or taxation of real or personal property belonging to or held in trust by the United States for any Indian or any Indian Tribe. The Act further provides that any tribal ordinance adopted by any

Indian Tribe in the exercise of the authority which it possesses shall be given full force and effect in the determination of civil causes arising under the Act.

5. The area within the exterior boundaries of plaintiff's Reservation is Indian country, notwithstanding the existence of patented or fee lands within said boundaries, and as the plaintiff has not consented to the jurisdiction of the defendant by agreement or otherwise and as there has been no enactment by Congress providing that Utah State law shall apply to the sales within the Reservation, the defendant has no jurisdiction within the exterior boundaries of the Reservation to tax Indians or Indian property.

6. The imposition of sales taxes on commercial transactions between plaintiff and others by the defendant violates the exclusive Federal jurisdiction over the right to regulate commerce with the Indian tribes established by Article I, Section 8, of the United States Constitution.

7. The collection and retention of sales and use taxes by defendant which were paid by plaintiff in the amounts herein set forth violate the provisions of Article I, Section 8, and Article VI, Clause 2, of the Constitution of the United States.

8. Congress has preempted State taxation of sales to or by Indians on Indian Reservations by the enactment of Title 25, §§ 261 through 264 of the United States Code.

9. The Utah State Constitution Article III, Section 2, acknowledges the absolute jurisdiction and control of the Congress of the United States over Indian lands and precludes the taxation of such lands until the title thereto shall have been extinguished by the United States.

10. Section 63-36-16, U.C.A., 1953, specifically limits the authority of the defendant to encumber or tax any real or personal property of the plaintiff and further disclaims jurisdiction in the Utah courts to adjudicate questions raised by the docketing of the warrant herein. Accordingly, litigation involving the alienation, encumbrance, or taxation of Indian property or purporting to restrict the use of such property must be resolved other than in the courts of the State of Utah.

11. The defendant has no jurisdiction to tax sales to or by the plaintiff within the exterior boundaries of the Uintah and Ouray Reservation.

12. The defendant further has no jurisdiction over sales made by the plaintiff from its plant at the Tribal Headquarters even if delivery of property sold occurs outside of the exterior boundaries of the Uintah and Ouray Reservation.

13. Sales made by the plaintiff where delivery was taken upon fee lands within the exterior boundaries of plaintiff's Reservation are deemed to have occurred within the exterior boundaries of the Reservation and are exempt from State jurisdiction.

14. The exercise of State jurisdiction to tax sales to or by Indians within plaintiff's Reservation interferes with plaintiff's right of tribal self-government and its right to self-determination and impairs rights granted or reserved by Federal law.

15. Plaintiff is the person who paid the tax to the defendant and therefore it is a taxpayer and is the person to whom the refund should be paid pursuant to the provisions of Section 59-15-8, U.C.A., 1953.

16. The defendant should be required to return to the plaintiff all sums inadvertently and erroneously forwarded and paid to defendant pursuant to the sales tax returns filed herein.

17. This Court should permanently enjoin the defendant from making further levy and collection of sales and use taxes on any sales made by the plaintiff or on sales to or by the plaintiff or other Indians within the exterior boundaries of the Uintah and Ouray Indian Reservation.

18. This Court should declare that all monies forwarded to the defendant by plaintiff be returned to plaintiff regardless of whether the sales took place within or without the exterior boundaries of the Reservation.

19. Title to lands held in trust by the Federal Government for Indians can be extinguished only with Federal consent and the determination of such titles is a matter of Federal law.

20. The defendant may not without the consent of Congress tax the property of the United States nor may it tax instrumentalities of the United States.

21. The assessment, levy and attempted collection by warrant of sales or use taxes by defendant on sales to or by the plaintiff as an instrumentality of the United States are illegal as to plaintiff and violate the provisions of Article I, Section 8, and Section VI, Clause 2, of the Constitution of the United States.

22. The warrant docketed by the defendant on May 22, 1974, is and should be declared by this Court to be null and void.

23. This Court should permanently enjoin the defendant from further docketing warrants pursuant to the provisions of Sections 59-15-11 and 59-16-15, U.C.A., 1953, as amended.

24. The Sales Tax Ordinance, effective January 1, 1974, adopted by plaintiff should be declared to be a validly existing tax ordinance in full force and effect within the exterior boundaries of plaintiff's Reservation, and defendant should be determined to be without authority to tax sales or to proceed in any way so as to conflict or interfere with the tax ordinance adopted by the plaintiff.

25. The plaintiff is an instrumentality of the United States for all purposes pertinent hereto.

26. One of the purposes of 28 U.S.C. § 1362 is to permit tribes to initiate litigation in the Federal Courts involving issues which could have been instituted by the United States as Trustee for the tribes, and the action herein could have been instituted by the United States.

27. The doctrine of sovereign immunity does not bar an action against a state agency for declaratory and injunctive relief against the application of State statutes which violate provisions of the Constitution of the United States.

28. Plaintiff was not required to exhaust administrative remedies with the defendant Tax Commission or with the courts of the State of Utah as a condition precedent to filing its Complaint herein.

29. A plain, speedy, efficient or otherwise adequate remedy was and is not available under Utah law or in the courts of the State of Utah to provide plaintiff the relief to which it is herein entitled.

30. Defendant by its actions in docketing a warrant against the property of the United States on May 22, 1974, and voluntarily and arbitrarily asserting a judgment lien against said property has waived its immunity from suit and consented to a determination of its rights herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that plaintiff is a sovereign American Indian tribe organized pursuant to Act of Congress of June 18, 1934, that the Uintah and Ouray Reservation is an Indian Reservation created, existing and with its boundaries established pursuant to Executive Orders of October 3, 1861, January 5, 1882, and under and pursuant to Acts of Congress of May 5, 1864 and March 11, 1948. Said Reservation constitutes Indian country, is within Federal jurisdiction, and is governed by the laws of the United States and defendant has no jurisdiction or authority to levy or collect sales or use taxes against the plaintiff within this Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that sales taxes levied by the defendant on sales of the plaintiff and its tribal enterprise, Ute Fab, Ltd., are illegal and invalid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that defendant be permanently enjoined from making further levy and collection of sales and use taxes made by the Ute Indian Tribe or on sales to or by Indians within the exterior boundaries of the Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count I of plaintiff's Complaint that defendant return to plaintiff the sum of $5,914.38, representing monies collected by the plaintiff and forwarded erroneously to the defendant as sales taxes for sales consummated within the exterior boundaries of plaintiff's Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count II of plaintiff's Complaint that defendant return to plaintiff the additional sum of $9,515.95, representing monies collected by the plaintiff and forwarded erroneously to the defendant as sales taxes on sales where delivery was made outside the exterior boundaries of plaintiff's Uintah and Ouray Reservation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count III of plaintiff's Complaint that defendant, State Tax Commission of the State of Utah, be and the same is hereby permanently enjoined from docketing further warrants against the Ute Indian Tribe pursuant to the provisions of Sections 59-15-11 and 59-16-15, U.C.A., 1953, as amended.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count III of plaintiff's Complaint that the warrant docketed against the plaintiff on May 22, 1974, in the total amount of $920.10 is null and void, having no force or effect whatsoever.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count IV of plaintiff's Complaint that plaintiff's taxing ordinance is legally enacted, is valid and is in full force and effect from January 1, 1974.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED with reference to Count IV of plaintiff's Complaint that the assessment, levy and collection of sales or use taxes by defendant on sales subject to plaintiff's ordinance are illegal and in violation of the Constitution of the United States.

DATED this 25th day of February, 1976.

WILLIS W. RITTER
Chief Judge
United States District Court

II. OPINION OF THE U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1602

THE UTE INDIAN TRIBE,

Appellee,

v.

STATE TAX COMMISSION OF THE STATE OF UTAH,

Appellant.

Appeal From The United States District Court
For The District of Utah
(D.C. # C-74-183)

Tom D. Tobin, Special Assistant Attorney General (Vernon B. Romney, Attorney General, G. Blaine Davis, H. Wright Volker, Michael L. Deamer, Assistant Attorneys General, with him on the Brief), for Appellant.

F. Burton Howard, Salt Lake City, Utah (Scott C. Pugsley, of Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, with him on the Brief), for Appellee.

Before SETH, Chief Judge, DOYLE, Circuit Judge, and STANLEY, Senior District Judge.*

SETH, Chief Judge.

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*Of the District of Kansas, Sitting by Designation.

This is an action brought by the Ute Indian Tribe against the State Tax Commission of the State of Utah for injunctive relief and for a declaratory judgment that the State of Utah sales taxes could not be levied or collected on sales of personal property made by a tribal enterprise within the boundaries of the Uintah and Ouray Reservation. The complaint also seeks the return of funds theretofore collected by the Tribe on such sales, and remitted to the State of Utah.

The trial court enjoined the State from seeking to collect sales taxes on sales made by the Tribe on the reservation, and directed the return to the Tribe of the collections theretofore made on such sales. The trial court determined that the reservation boundaries were as originally established. The State has taken this appeal.

It is apparent that this appeal is controlled basically by *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463; *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, and *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164.

In *Moe* the Court considered the relationship between 28 U.S.C. § 1341, which generally prohibits injunctions preventing the levy or collection of state taxes if there is a plain and speedy state remedy, and 28 U.S.C. § 1362 which gives the district courts jurisdiction over "all" civil actions brought by Indian Tribes in controversies arising under the Constitution, laws, or treaties of the United States. The Court in *Moe* decided that 28 U.S.C. § 1362 was intended to grant jurisdiction to the district courts in civil actions in all instances where the United States could have or had the requisite interest to commence such suit. The Court relied on *Heckman v. United States,* 224 U.S. 413, and *United States v. Rickert,* 188 U.S. 432. The Court in *Moe* then said:

> ". . . Since the United States is not barred by § 1341 from seeking to enjoin the enforcement of a state tax law, *Department of Employment v. United States, supra,* we hold that the Tribe is not barred from doing so here."

The Court in *Moe* thus indicated that the above interpretation of section 1346 was the proper method to apply section 1341 rather than using the federal instrumentality doctrine. The basis is described as a preemption of State taxing authority by federal legislation. This also apparently meets the Eleventh Amendment arguments. The Court also there discussed the state service arguments, and the General Allotment Act arguments advanced by the State of Montana. The Court in *Moe* held that it is proper to give special treatment and special preference to the Indians because they are Indians. Thus they were so set apart on racial grounds as in *Morton v. Mancari,* 417 U.S. 535, quoted by the Court. The court also discussed the checkerboard problem arising from non-Indian land ownership within the reservation boundaries, and again held that the fact the plaintiffs were of a particular "racial" group and tribal organization permitted them to assert rights not available to non-Indians in the same area. They can also assert rights over non-Indians in the same area under *Morton v. Mancari,* 417 U.S. 535, cited in *Moe.*

The Court in *Moe* concluded that the State of Montana could not assess a vendor's license fee against an Indian for selling cigarettes on "reservation land," and could not apply the cigarette sales tax on "reservation sales" by Indians to Indians. The Court expressly did not extend the prohibition to sales by Indians on Indian land to non-Indians. The Montana tax was on the consumer and precollected. The Court also held that the

Indian retailer could be required to collect the tax for the State on sales to non-Indians.

The Utah sales tax under Utah Code Ann. § 59-15-1 places a tax on the purchaser of tangible personal property. The seller collects the tax on behalf of the State from the buyer at the time of the sale, and remits to the State. Where a "sale" is made is defined by Utah law and for the most part is where the goods are delivered.

Insofar as this action seeks to have the State of Utah return sales taxes collected by the Tribe under a generalized or lump-sum claim, it must fail as these funds now in the hands of the State were paid by the buyers of the goods and not by the sellers. If anyone can seek recovery or refund, it is these buyers.

The portion of the complaint which seeks to enjoin the imposition of a sales tax is another matter. Under the decisions of the Supreme Court, referred to above, sales on trust lands by the Tribe to Indians are not subject to the state sales tax. The State here so acknowledges. The provisions of the Utah Enabling Act do not lead to a different conclusion.

As to sales by the Ute commercial enterprise here concerned on trust lands to non-Indians, the Utah sales tax is applicable. This is also in accordance with *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463.

We also hold that sales not on trust lands by the Tribe to Indians only are not within the state taxing power.

We are unable from the record to find any evidence or basis for the determination by the trial court as to the boundaries of the reservation or what might constitute trust lands. The issue was not litigated apparently

due to a misunderstanding as to a provision in the pretrial order. Also this was a matter which required the proof of facts and of the application of law. It was not subject to a stipulation binding on the court in any manner. The finding by the trial court as to the reservation boundaries or as to trust lands was clearly erroneous. Again, under the circumstances, this may not be an issue.

The case must be REVERSED AND REMANDED for further proceedings consistent with this opinion.

III. ORDER DENYING PETITION FOR REHEARING

MAY TERM — June 2, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Circuit Judges, and Honorable Arthur J. Stanley, Jr., Senior District Judge

No. 76-1602

THE UTE INDIAN TRIBE,
Plaintiff-Appellee,

vs.

STATE TAX COMMISSION OF THE STATE OF UTAH,
Defendant-Appellant,

UNITED STATES OF AMERICA,
Amicus Curiae,

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges Seth and Doyle and Senior District Judge Stanley to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. I, § 8 — CONSTITUTION OF THE UNITED STATES

The Congress shall have Power . . .

• • •

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

Art. III — CONSTITUTION OF UTAH

Second:—The people inhabiting this State do affirm and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries hereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. The lands belonging to citizens of the United States, residing without this State shall never be taxed at a higher rate than the lands belonging to residents of this State; but nothing in this ordinance shall preclude this state from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, by patent or other grant, a title thereto, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress, containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such extent, as is or may be provided in the act of Congress granting the same. (As amended November 5, 1946, effective January 1, 1947.)

UTAH ENABLING ACT (28 Stat. 107)

Second:—That the people inhabiting said proposed State do agree that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as such Act of Congress may prescribe.

UNITED STATES CODE 25 § 476

Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the

case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987.

25 § 1322 — Assumption by State of civil jurisdiction — Consent of United States; force and effect of civil laws

(a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such state to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of

general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Alienation, encumbrance, taxation, use, and probate of property

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

Force and effect of tribal ordinances or customs

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub.L. 90—284, Title IV, § 402, Apr. 11, 1968, 82 Stat. 79.

UTAH CODE ANNOTATED, 1953, AS AMENDED

58-15-2. Definitions — Scope — Exemptions — Retail sales — Wholesale sales.

• • •

(b) The term "sale" or "sales" includes installment and credit sales, every closed transaction constituting a sale, and also includes the sale of electrical energy, gas, services or entertainment taxable under the terms of this

act. A transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price shall be deemed a sale. An even exchange of tangible personal properties shall not be deemed a sale for purposes of this act, but in any transaction wherein tangible personal property is taken as part of the sales price of other tangible personal property, the balance valued in money or other consideration shall be deemed a sale.

• • •

(h) The word "tax" means either the tax payable by the purchaser of a commodity or service subject to tax, or the aggregate amount of taxes due from the vendor of such commodities or services during the period for which he is required to report his collections, as the context may require.

59-15-4. Excise tax — Rate. — From and after the effective date of this act there is levied and there shall be collected and paid:

(a) A tax upon every retail sale of tangible personal property made within the state of Utah equivalent to four per cent of the purchase price paid or charged, except that where a person takes, as a trade-in for part payment of the merchandise sold, tangible personal property other than money, that tax shall be computed and paid only upon the net difference between the selling price of the merchandise sold and the amount of the trade-in allowance. The sale of coal, fuel oil and other fuels shall not be subject to tax except as hereinafter provided.

59-15-5. Collection of tax — Remission — Returns — Direct payment by purchaser of motor vehicle — Tokens — Deposit of security and sale thereof — Remission of excess amount collected — Penalties and interest for violations — Fine or imprisonment. — Every person receiving any payment or consideration upon a sale of property or service subject to the tax under the provisions of this act, or to whom such payment or consideration is payable (hereinafter called the vendor) shall be responsible for the collection of the amount of the tax imposed on said

sale; provided, however, that where any sale of tangible personal property is made by a wholesaler to a retailer, upon the representation by the said retailer that the said personal property is purchased by the said retailer for resale, and the said personal property thereafter is not resold, the wholesaler shall not be responsible for the collection or payment of the tax imposed on the said sale, but the said retailer shall be solely liable for the said tax. The vendor shall collect the tax from the vendee, but in no case shall he collect as tax an amount (without regard to fractional parts of one cent) in excess of the tax computed at the rates prescribed by this act, provided, however, that on all motor vehicle sales made by other than a regular licensed dealer the tax shall be paid by the purchaser directly to the state tax commission upon every sale of a motor vehicle subject to registration and licensing under the laws of this state, and shall be collected by the state tax commission at the time of such registration and licensing. The tax imposed by this act shall be due and payable to the state tax commission quarterly on or before the thirtieth day of the month next succeeding each calendar quarterly period, the first of such quarterly periods being the period commencing with the first day of January, 1953. Every vendor shall on or before the thirtieth day of the month next succeeding each calendar quarterly period, file with the commission a return for the preceding quarterly period. The return shall be accompanied by a remittance of the amount of tax herein required to be collected by the vendor for the period covered by the return. The tax as computed in the return shall in all cases be based upon the total sales made during the period including both cash and charge sales. Credit shall be allowed to the vendor for taxes paid on sales represented by that portion of an account determined to be worthless and actually charged off for income tax purposes or on the portion of the purchase price remaining unpaid at the time of a repossession made under the terms of a conditional sales contract. Such returns shall contain such information and be made in such manner as the tax commission may by regulation

prescribe. The state tax commission may extend the time for making returns and paying the taxes collected under such rules and regulations as it may prescribe, but no such extension shall be for more than ninety days. The state tax commission, if it deems it necessary in order to ensure the payment of the tax imposed by this act, may require returns and payment of the tax to be made for other than quarterly periods.

If the accounting methods regularly employed by the vendor in the transaction of his business are such that reports of sales made during a calendar month will impose unnecessary hardships, the state tax commission may accept reports at such intervals as will in its opinion better suit the convenience of the taxpayer and will not jeopardize the collection of the tax.

For the purpose of more efficiently securing the payment, collection and accounting for the taxes provided for under this act, the tax commission in its discretion, by proper rules and regulations, shall provide for the issuance of tokens or other appropriate devices to facilitate collections; provided, no tax or token shall be collected on lunches or dinners served by schools, churches, or charitable institutions.

The tax commission, whenever it deems it necessary to ensure compliance with the provisions of this act, may require any person, subject to the tax imposed hereunder to deposit with it such security as the state tax commission shall determine. The same may be sold by the state tax commission at public sale if it becomes necessary so to do in order to recover any tax, interest or penalty due. Notice of such sale may be served upon the person who deposited such securities personally or by mail; if by mail, notice sent to the last known address as the same appears in the records of the state tax commission shall be sufficient for the purposes of this requirement. Upon such sale the surplus if any, above the amounts due under this act, shall be returned to the person who deposited the security.

If any vendor shall, during any reporting period collect as a tax an amount in excess of two per cent of his total taxable sales, he shall remit to the commission the full amount of the tax herein imposed and also such excess; and if any vendor under the pretence or representation of collecting the tax imposed by this act shall collect during any reporting period an amount in excess of two per cent of his total taxable sales, the retention of such excess or any part thereof, or the intentional failure to remit punctually to the tax commission on the full amount required to be remitted by the provisions of this act, is declared to be unlawful and shall be punishable by a fine of not exceeding $1,000 or by imprisonment for not to exceed six months or both such fine and imprisonment.

Any person failing to pay any tax to the state or any amount of tax herein required to be paid to the state within the time required by this act, or file any return as required by this act, shall pay, in addition to the tax, penalties and interest as provided in section 59-15-8 hereof.

59-15-8. Overpayment and deficiencies. — As soon as practicable after the return is filed, the tax commission shall examine it; if it then appears that the correct amount of tax to be remitted is greater or less than that shown on the return to be due, the tax shall be recomputed.

If the amount paid exceeds that which is due, the excess, together with interest thereon at the rate of one-half of one per cent per month from the date of overpayment, and if it is determined that the original overpayment was not intentionally made for purposes of investment, it shall be credited or refunded to the person paying it upon written application therefor. If the commission determines that any amount, penalty or interest has been paid more than once or has been erroneously or illegally collected or computed, the commission shall certify to the state auditor the amount collected in excess of what was legally due, from whom it was collected or by whom paid to the commission, and the amount of interest computed

thereon, and if approved by the state auditor, it shall be credited on any amounts then due from that person to the state of Utah under this act or under any other taxing act, the administration of which is vested in the commission and the balance shall be refunded to that person or his successors, administrators, executors or assigns, but no such credit or refund shall be allowed unless a claim is filed with the state tax commission within three years from the date of overpayment.

In the event any amount has been illegally determined to be due from any person, the commission shall authorize the cancellation of the amounts upon its records.

If the amount paid is less than the amount due, to the difference shall be added interest thereon at the rate of one-half of one per cent per month from the time the return was due.

If any part of the deficiency is due to negligence or intentional disregard of authorized rules and regulations with knowledge thereof, but without intent to defraud, there shall be added ten per cent of the total amount of the deficiency and interest at the rate of one percent per month on the amount of the deficiency from the time the return was due. If any part of the deficiency is due to fraud with the intent to evade, there shall be added one hundred per cent of the total amount of the deficiency and interest at the rate of one per cent per month on the deficiency from the date the return was due.

The deficiencies in tax, together with penalties and interest imposed by this section, shall be due and payable by the taxpayer within ten days after notice and demand by the tax commission; except that when the commission determines that a greater amount was due than was shown on the return, and the tax is not deemed to be in jeopardy, the additional tax, penalty and interest shall be due payable within thirty days after the commission mailed its report of deficiency determination.

Except in the case where a deficiency is due to fraud with intent to evade tax or a failure to file a return, the

amount of taxes imposed by this chapter shall be assessed within three years after the return was filed and if not so assessed no proceeding for the collection of the taxes shall be begun after the expiration of the period.

In the case of a false or fraudulent return or payment with intent to evade tax or of failure to file a return, the tax may be assessed or a proceeding for the collection of the tax may be begun without assessment at any time.

Upon making a record of its reasons, the commission shall have the power, in its discretion, to waive, reduce or compromise any of the penalties or interest provided in this chapter.

59-15-11. Collection of tax by warrant. — A tax due and unpaid under this act shall constitute a debt due the state from the vendor and may be collected, together with interest, penalty and costs, by appropriate judicial proceeding, which remedy shall be in addition to all other existing remedies.

If the tax imposed by this act or any portion thereof is not paid when the same becomes due and if the vendor liable for the payment of the amount has not regularly followed the procedure outlined in sections 59-15-12, 59-15-13, 59-15-14, 59-15-15, and 59-15-16 hereof, the tax commission may issue a warrant in duplicate, under its official seal, directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of a delinquent taxpayer found within his county for the payment of the amount due thereof, with the added penalties. interest, and costs and to return such warrant to the tax commission and pay to it the money collected by virtue thereof by a time to be therein specified, not more than sixty days from the date of the warrant. Immediately upon receipt of said warrant in duplicate the sheriff shall file the duplicate with the clerk of the district court in his county and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors, the name of the delinquent taxpayer mentioned in the warrant and, in appropriate columns,

the amount of tax, penalties, interest and costs for which the warrant is issued and the date when such duplicate is filed, and thereupon the amount of such warrant so docketed shall have the force and effect of an execution against all personal property of the delinquent taxpayer and shall also become a lien upon the real property of the delinquent taxpayer in the same manner as a judgment duly rendered by any district court and docketed in the office of the clerk thereof. The sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner as is prescribed by law in respect to executions issued against property upon judgments of a court of record and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner.

Supreme Court
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IN THE

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OCTOBER TERM 1978

No. 78-292

THE UTE INDIAN TRIBE, *Petitioner,*

v.

THE STATE TAX COMMISSION OF UTAH, *Respondent.*

BRIEF OF THE STATE TAX COMMISSION OF UTAH IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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OCTOBER TERM 1978

No. 78-292

THE UTE INDIAN TRIBE, *Petitioner,*

v.

THE STATE TAX COMMISSION OF UTAH, *Respondent.*

BRIEF OF THE STATE TAX COMMISSION OF UTAH IN OPPOSITION TO PETITION FOR CERTIORARI

QUESTIONS PRESENTED

I. Whether the Court of Appeals was correct in its findings that the legal incidence of the Utah sales tax falls on the purchaser of personal property.

II. Whether the issue of the propriety of State collection enforcement proceedings raised by Petitioner is moot.

III. Whether the validity of the tribal tax ordinance and pre-emption arguments raised by the Petitioner in regard to the ordinance were properly disregarded by the Court of Appeals.

IV. Whether the Court of Appeals properly held that the District Court's findings concerning the present boundaries of the Uintah and Ouray Reservation were clearly erroneous.

STATEMENT

This case concerns the validity of taxes imposed by the Respondent on sales to both Indians and non-Indians by the Petitioner's tribal enterprise. Sales were made to those both within and without the boundaries of the Uintah and Ouray Reservation. Pursuant to Rule 40(3) of the Supreme Court Rules, Respondent states the following facts:

1. In March, 1974, the Petitioner demanded that money forwarded by it to the Respondent pursuant to State sales collections be returned. (Findings of Fact, No. 16, Pet. at A-5). The Respondent's Auditing Division denied the Petitioner's refund claim, and the Petitioner requested a hearing before the Respondent tax commission. After Petitioner initiated the instant suit, it elected not to pursue its administrative remedies. (Written Objections to Findings of Fact, Conclusions of Law and Order, No. 7.)

2. Although the docketed warrant has the legal effect of an execution upon personal property of the delinquent party, no actual execution upon the Petitioner's property ever transpired. The warrant was docketed by clerical personnel as would be done in any case upon failure to remit taxes to the State. Further, the warrant was voluntarily released immediately after the Petitioner filed its complaint in this case. The Respondent released the warrant upon realization that the delinquent party was an Indian tribe, and also to have the District Court determine the respective rights of the parties in, what was at that time, an unsettled area of the law.

3. Throughout the District Court litigation, the Respondent attempted to present evidence regarding the

diminished boundaries of the Uintah and Ouray Reservation. (Pre-Trial Order, Stipulated Issues of Law, para. 18; R., vol. I, pp. 45-47; R., vol. II, pp. 6-7). This evidence was summarily rejected by the Trial Judge, Chief Judge Ritter, (R., vol. I, pp. 45-47; R., vol. II, pp. 6-7), which prompted the Respondent to file supplementary materials with the Court of Appeals. The District Court never requested the parties to brief the reservation boundary issue in this case.

4. Following trial, Chief Judge Ritter ordered the Petitioner to prepare Findings of Fact and Conclusions of Law, which the District Court adopted as its own. (R., vol. I, p. 69.) The Trial Court refused to alter any findings of fact or conclusions of law despite both written and oral objections made by the Respondent, and the post-trial decision by this Court in *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976), which was called to the attention of the District Court and dispositive of the major issues in the case. (Written Objections to Findings of Fact, Conclusions of Law and Order; R., vol. II.)

5. This case is one of three in which the boundaries of the Uintah and Ouray Reservation have been in issue. The two other cases in which the boundaries of the reservation have been in issue will be discussed in Part IV, *infra.*

INTRODUCTION

Petitioner Has Not Raised Substantial Questions Requiring Resolution by the Court.

The Petitioner argues that substantial questions concerning the economic self-determination of Indian tribes result from the holding of the Court of Appeals in this case. (Pet. at 11-12.) While several of the ques-

tions resolved by the Court of Appeals may have, at one time, been unresolved, they have been settled by this Court in *Moe* v. *Confederated Salish & Kootenai Tribes, supra.* Those issues raised by Petitioner which were not specifically addressed in *Moe* are presently either moot or non-justiciable. The Court of Appeals in this case properly held that the legal incidence of the Utah sales tax falls on the purchaser of personal property, and that the District Court's findings concerning the present boundaries of the Uintah and Ouray Reservation were clearly erroneous. The court below properly disregarded Petitioner's arguments regarding the tribal tax ordinance and the State collection enforcement proceedings, as this latter issue became moot when Respondent voluntarily released its warrant immediately after initiation of the suit.

In addition, it should be noted that this case is but one of many that were filed to re-establish the original boundaries of a reservation. Indeed, the Petitioner here has also sought to litigate the boundary question in another district court action. *Ute Indian Tribe* v. *State of Utah,* No. C-75-408 (D. Utah, complaint filed Oct. 15, 1975). There, Petitioner claims felony jurisdiction over Indians and non-Indians within its reservation boundaries under its Law and Order Code. The issues raised by Petitioner in these two suits are akin to those raised in other suits in which Indian tribes have sought to resurrect the original boundaries of a reservation. The analysis of this Court in *DeCoteau* v. *District County Court,* 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977), however, has laid to rest much of the original boundary advocacy. *See, e.g., United States ex rel. Cook* v. *Parkinson,* 525 F.2d 120 (8th Cir. 1975), *cert. denied,* 430

U.S. 982 (1977). The *DeCoteau* and *Rosebud* decisions are also dispositive of Petitioner's attempts to enlarge the present boundaries of its reservation.

The issues raised by Petitioner present questions already resolved by this Court in *Moe, DeCoteau,* and *Rosebud,* and do not necessitate further judicial review.

I.

THE COURT OF APPEALS WAS CORRECT IN ITS FINDINGS THAT THE LEGAL INCIDENCE OF THE UTAH SALES TAX FALLS ON THE PURCHASER OF PERSONAL PROPERTY.

A. The construction of the taxing statute is not controlled by the Utah State court decisions.

Where questions of constitutional dimension are presented, federal courts are not bound by state court constructions of statutes, since "the duty rests on [the federal court] to decide for itself facts or constructions upon which federal constitutional issues rest." *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 121 (1954). This general principle is equally applicable in cases where constitutional immunity from taxation is involved. *Diamond National Corp.* v. *State Board of Equalization,* 425 U.S. 268 (1976); *United States* v. *Mississippi Tax Commission,* 421 U.S. 599, 609, n. 7 (1975); *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 347 (1968).[1]

[1] Although many of the cases which have applied this principle have been federal instrumentality cases, the principle does not lose its force because of this Court's decision in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 150 (1973) (immunity from taxation in Indian affairs of legislative derivation and not within scope of federal instrumentality doctrine). While this rule of interpretation may have developed, in part, in a federal instrumentality context, there is no indication in cases applying the principle that it is so confined.

Petitioner in the present case asserts immunity from the state sales tax on the basis of its unique character as an entity whose status is determined by congressional policies formulated under Congress' plenary constitutional power to legislate regarding Indian Tribes. (Pet. at 9.) *Cf.* U.S. CONST. art. I, § 8; art. II, § 2, cl. 2. Since this alleged tax immunity would derive from a status conferred by the Constitution, the taxation issue presents a federal question of constitutional dimension on which state court decisions cannot bind the federal courts. It is thus appropriate to examine the question of the legal incidence of the Utah sales tax by reference to standards enunciated by the federal courts.

B. Decisions of this Court support the conclusion that the incidence of the Utah sales tax falls on the purchaser.

This Court has consistently held that where a state statute requires that the tax be passed on to the purchaser and collected by the vendor, the legal incidence of the tax presumptively falls on the purchaser. *United States* v. *Mississippi Tax Commission, supra* at 608; *First Agricultural National Bank* v. *State Tax Commission, supra* at 347. This presumption is not changed by the fact that the vendor is made legally liable for the tax. *United States* v. *Mississippi Tax Commission, supra* at 607. Most recently, this Court has held that, even where the state statute did not by its terms require that the vendor pass the tax on to the purchaser, the incidence of the tax still fell on the purchaser. *Diamond National Corp.* v. *State Board of Equalization, supra.*

The *Diamond* case is particularly apposite to the present case because of the similarity between the

California statute at issue there, and the Utah sales tax.[2] Thus, under *Diamond,* the collection requirement of the Utah statute alone suffices to raise the presumption that the legal incidence of the tax is on the purchaser.

C. If state decisional law and state administrative interpretations are relied upon to resolve this question, Utah court decisions and state administrative regulations support the conclusion that the legal incidence of the tax is on the purchaser.

As a general matter, Utah courts characterize the sales tax as a tax on the "transaction." *Robert H. Hinckley, Inc.* v. *State Tax Commission,* 17 Utah 2d 70, 404 P.2d 662, (1965); *W. F. Jensen Candy Co.* v. *State Tax Commission,* 90 Utah 359, 61 P.2d 629, 630 (1936). When faced with the specific question at issue in the present case, the incidence of the tax, Utah courts have consistently held that the tax falls on the purchaser.[3] Statements in the case law to this effect are numerous, and because of their clarity bear inclusion here: *Robert H. Hinckley, Inc.,* v. *State Tax Commission, supra,* at 668 ("... the clear intent of the law is the collection of

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[2] Sec. 6052 of the Cal. Rev. & Tax. Code (1970) provides:

> The tax hereby imposed shall be collected by the retailer from the consumer insofar as it can be done.

Similarly, U.C.A. § 59-15-5 provides:

> The vendor shall collect the tax from the vendee. . . .

[3] It should be noted at this point that Petitioner's citation of U.C.A. § 59-15-2(h) is potentially misleading. (Pet. at 12). The definition of "tax" in that section reads as follows:

> The word "tax" means *either the tax payable by the purchaser* of a commodity or service subject to tax, *or* the aggregate amount of taxes due from the vendor of such commodities or services during the period for which he is required to report his collections, *as the context may require.* (Emphasis added.)

approximately the correct amount from vendees and the remittance by vendors of the tax due. . . .") ; *Ralph Child Construction Co.* v. *State Tax Commission,* 12 Utah 2d 53, 362 P.2d 422, 424 (1961) ("The primary obligation to pay the tax is on the ultimate consumer. . . .") *(dicta)* ; *E. C. Olsen* v. *State Tax Commission,* 109 Utah 563, 168 P.2d 324, 326 (1946) ("The sales tax in this state is a tax on the 'consumer'.") ; *Bird & Jex Co.* v. *Anderson Motor Co.,* 92 Utah 493, 69 P.2d 510, 512 (1937) (". . . the vendor is responsible for the collection of this tax. It would appear, therefore, that the vendor's status, under the act, is that of a collector rather than that of a taxpayer. . . .")

In addition, the Respondent's interpretation of the legal incidence of the tax at issue here is consonant with that of the case law. In this regard, it is provided that:

> It is unlawful for the vendor in any way to waive the collection or imposition of the tax or to consider that the tax is included and collected as part of the sales price. The vendor must add the tax to the sales price as a separate item and collect from the vendee. The vendor is required to remit to the tax commission all tax funds in his possession and is a guarantor of all amounts required to be collected under the sales tax act.

Regulation S4, *Sales & Use Tax Regulations,* Utah State Tax Commission (1975).

Faced with this consistent body of case law, Petitioner is hard pressed to support its argument that the incidence of the sales tax falls on the vendor. Petitioner relies principally on statements recognizing the responsibility of the vendor to collect the tax, but this requirement neither supports the conclusion that the tax falls on the vendor, nor constitutes an "undue burden" on the Tribe under *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976). In fact, as pointed out in Part I (B), *supra,* this requirement lends additional support to the conclusion that the incidence of the sales tax is on the purchaser.

Petitioner's reliance on *Ogden Union Railway* v. *State Tax Commission,* 16 Utah 2d 23, 395 P.2d 57 (1964), is similarly misplaced. An aberration in the otherwise consistent body of case law, the statement in that case quoted by Petitioner should not be accorded undue weight for various reasons.

Petitioner argues that the following passage from the *Ogden* case supports its position that the vendor is a taxpayer under Utah law:

> First we must clarify that the sales tax is imposed upon all *sales* of tangible personal property where passage of title and delivery occur within the State of Utah. . . . One need need not be "retailer" [sic] to be taxed. *Either retailers or wholesalers are taxed if the sale is to the consumer or user.* (First emphasis in original; second added.)

(Pet. at 14.) The fallacy in Petitioner's argument and reliance on *Ogden,* however, is revealed by the final parenthetical sentence in the cited passage; that is, the court in *Ogden* unequivocally indicated, through its use of italics, that the Utah tax was imposed on the sale. Petitioner's insertion of italics in the final sentence, however, serves to attach undue significance to that sentence when the court itself chose not to.

The inclusion of that sentence in the *Ogden* case can more logically be attributed to the fact that the court was simply addressing the plaintiff's argument that it could not be held liable for the sales tax because it was a "retailer". Indeed, the statement could merely be the

result of careless drafting by the court. The *Ogden* case, therefore, cannot be said to support the broad proposition advanced by Petitioner that the Utah sales tax falls on the vendor.

Finally, it should be noted that Petitioner includes only a cursory reference to *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* (Pet. at 14), a case which, standing alone, can be regarded as dispositive of the taxation issue raised in the present case.

Petitioner states:

> The importance of further review of this issue by this Court is not limited to whether or not the Tribe gets the refund, but is demonstrated by the emphasis in the *Moe* decision that the tax considered therein was solely a tax on the non-Indian customer and not a tax on the reservation Indian himself.

(Pet. at 14.)

In fact, examination of the case reveals that Petitioner's discussion of *Moe* is both inadequate and superficial. This Court in *Moe* stated:

> The Tribe . . . urges that the State cannot impose its cigarette tax on sales by Indians to non-Indians because "[i]n simple terms, [the Indian retailer] has been taxed, and . . . has suffered a measurable out-of-pocket loss." But this claim ignores the District Court's finding that "it is the non-Indian consumer or user who saves the tax and reaps the benefit of the tax exemption." (Citation omitted.) . . . Without the simple expedient of having the retailer collect the sales tax from non-Indian purchasers, it is clear that wholesale violations of the law by the latter class will go virtually unchecked.

Id. at 481-82.

The pivotal inquiry in *Moe* was thus on which party to the transaction the benefit of the tax exemption fell; since the tax was imposed on the consumer, it necessarily followed that the tax exemption benefited the consumer as well. Similarly in the present case, any exemption from the state sales tax would only benefit the non-Indian purchaser, since the legal incidence of the tax is on him.

II.

THE ISSUE OF THE PROPRIETY OF STATE COLLECTION ENFORCEMENT PROCEEDINGS RAISED BY PETITIONER IS MOOT.

Petitioner attempts to present for consideration by this Court the question of whether proceedings instituted by the Respondent to enforce collection of its sales tax constituted an undue interference with tribal affairs. (Pet. at 2.) Examination of the facts before this Court at this point, however, reveals that the enforcement issue is moot, and Petitioner is thus precluded from seeking injunctive or declaratory relief on that issue.

The State Tax Commission withdrew the warrant docketed against Petitioner's property immediately after initiation of the present suit. The pivotal inquiry is thus whether withdrawal of the challenged action moots the enforcement issue raised by the Petitioner. The general standard for determining whether voluntary cessation of challenged conduct renders an issue moot for purposes of injunctive relief is contained in *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632-633 (1953):

> Both sides agree to the abstract proposition that voluntary cessation of allegedly illegal conduct

> does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.
>
> * * *
>
> The case may nevertheless be moot if the defendand can demonstrate that "*there is no reasonable expectation that the wrong will be repeated.*" (Citation omitted.) (Emphasis added.)

See also, Preiser v. *Newkirk,* 422 U.S. 395 (1975); *United States* v. *Concentrated Phosphate Export Association, Inc.,* 393 U.S. 199 (1968).

This standard has clearly been met in the present case. First, the enforcement proceedings were initiated against Petitioner as a routine clerical matter, and the warrant was released to obtain a judicial determination of the legality of the imposition of the Utah sales tax. The subsequent decision by this Court in *Moe* v. *Confederated Salish & Kootenai Tribes, supra,* and the decision of the Court of Appeals in the present case have clarified the respective legal positions of the parties. The incentive for using the enforcement procedures and the likelihood of their recurrence by the Respondent's unilateral action are eliminated. Therefore, there is clearly "no reasonable expectation that the wrong will be repeated". *United States* v. *W. T. Grant Co., supra.*

A second factor which lessens the possibility that the enforcement proceeding will be a matter of future controversy is that the use of that procedure can only be triggered by the refusal of the Petitioner to remit the sales tax in the future, an act which is clearly proscribed by *Moe* v. *Confederated Salish & Kootenai Tribes, supra.* Where the possibility of future injury

rests on the likelihood that a litigant will violate an unchallenged law, the controversy has been found to be too conjectural to warrant a hearing. *O'Shea* v. *Littleton,* 414 U.S. 488, 496-98 (1974). In *O'Shea,* the combined possibilities that the plaintiffs would both violate the law and be subject to improper treatment were deemed insufficiently immediate to confer standing.[4]

Unless Petitioner wishes to impute to itself future bad faith action in withholding the tax required to be collected and remitted to the State, the necessity and likelihood of future enforcement proceedings are miniscule.

Relief in the form of a declaratory judgment is similarly foreclosed to Petitioner. A recent and most relevant discussion on mootness in the context of declaratory judgments is contained in *Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 121, 122 (1974), where this Court held the requirements of Article III and the Declaratory Judgment Act were met because

> the challenged governmental activity in the present case is not contingent, has not evaporated or disappeared, and, by its continuing and brooding presence, casts what may well be a substantial adverse effect on the interests of the petitioning parties.

In distinguishing another case, *Oil Workers Union* v. *Missouri,* 361 U.S. 363 (1960), the Court pointed out that the governmental action there—seizure of a public utility—was "so remote and speculative that there was no tangible prejudice to the existing interests of

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[4] Justiciability considerations underlying standing and mootness bear similar characteristics. *Warth* v. *Seldin,* 422 U.S. 490, 499, n. 10 (1975).

the parties. . . ." *Super Tire Engineering Co.* v. *McCorkle, supra* at 123. The speculative and remote nature of the action in *Oil Workers* stemmed from the fact that the possibility of the recurrence of the strike which led to the initiation of the suit was viewed as slight, while the State was considered to have broad discretion in handling these types of situations. *Id.*

The present case is clearly analogous to the *Oil Workers* case in that, as discussed above, recurrence of the challenged conduct is dependent on the Petitioner's actions and a discretionary decision by Respondent to initiate enforcement proceedings.[5] The withdrawn warrant does not constitute an "immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest," *Super Tire, supra* at 125-26, and thus does not satisfy the requirements for issuance of declaratory relief.

Finally, even if the tax enforcement issue is not considered so remote as to be moot, the peculiar way in which this issue comes before this Court renders it non-justiciable. The trial record below does not reflect any consideration of actual enforcement procedures used by Respondent or of their potential effect on Petitioner. These considerations would be crucial in assessing the validity of the State procedure. In *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583 (1972), a change in election laws which rendered moot most of the issues in a suit challenging those laws was held to have ren-

[5] U.C.A. § 59-15-11 states in part:

> If the tax imposed by this act or any portion thereof is not paid when the same becomes due . . . the tax commission *may issue a warrant*. . . . (Emphasis added.)

dered the remaining issue non-justiciable. The court there stated that:

> The long and the short of the matter is that we know very little more about the operation of the Ohio affidavit procedure as a result of this law suit than we would if a prospective plaintiff who had never set foot in Ohio had simply picked this section of the Ohio election laws out of the statute books and filed a complaint in the District Court. . . . These plaintiffs may well meet the technical requirement of standing, and they may be parties to a case or controversy, but their case has not given any particularity to the effect on them of Ohio's affidavit requirement.

Id. at 588.

Similarly, this case does not clearly present the types of enforcement problems which may in the future affect parties similarly situated to warrant this Court's consideration.

III.

THE VALIDITY OF THE TRIBAL TAX ORDINANCE AND PRE-EMPTION ARGUMENTS RAISED BY THE PETITIONER IN REGARD TO THE ORDINANCE WERE PROPERLY DISREGARDED BY THE COURT OF APPEALS.

The Petitioner has raised a variety of pre-emption arguments and has stated generally that the effect of the Court of Appeals decision will have an adverse impact on tribal self-government.[6] (Pet. at 9-12.) The pre-emption arguments have been raised in regard to the effect of the tribal tax ordinance. As a preliminary

[6] As noted in Part II, *supra*, the question of whether a warrant may be docketed against tribal property is now moot and those arguments raised by Petitioner that the docketing procedure is pre-empted or interferes with tribal self-government will, therefore, not be examined.

matter, it should be noted that the validity of the tribal ordinance has never been in issue in this case. The Respondent has asserted neither at trial nor on appeal that the ordinance is invalid. Rather, Respondent has only argued that this issue is non-justiciable. (Written Objections to Findings of Fact, Conclusions of Law and Order, No. 2.)

The ordinance, standing alone, cannot pre-empt state taxation. As recently stated by a federal district court, a "tribe cannot preempt a power which rests with the state government simply by enacting an ordinance inconsistent with the power and authority of the state, and consistent with tribal self-government, absent the authority of Congress . . . ." *United States* v. *Montana,* No. CV-105-BLG, slip op. at 19 (D. Mont., filed July 31, 1978).

The Petitioner appears to argue that it nevertheless has the power of taxing non-Indians, and that this power has somehow pre-empted that of the Respondent. (Pet. at 10, 11.) Reliance for this argument is placed on an Interior Decision, Powers of Indian Tribes, 55 I. D. 14 (1934), defining the sovereign powers of Indian tribes. Under this decision, tribes are said to have the power to tax non-members of a tribe. *Id.* at 46. This decision, however, antedates this Court's analysis of the question of whether tribes possess inherent sovereign power to exercise jurisdiction over non-Indians. *See Oliphant* v. *Suquamish Indian Tribe,* 98 S. Ct. 1011 (1978) (Indian tribe could not try non-members in tribal courts). In examining the inherent sovereign powers of tribes, this Court has stated that

> the sovereign power of a tribe to prosecute its members for tribal offenses clearly does not fall within that part of sovereignty which the Indians

> implicitly lost by virtue of their dependent status. The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving relations between an Indian tribe and non-members of the tribe . . . .

United States v. *Wheeler,* 98 S. Ct. 1079, 1082 (1978).

Under this Court's analysis in *Wheeler,* the Petitioner is apparently without power to tax non-Indians. Assuming such power did exist and was a power "vested in any Indian tribe . . . by existing law" under 25 U.S.C. § 476, (Pet. at 11), the tribal ordinance could not pre-empt the Respondent's power to tax its own citizens absent an express delegation of power to the Petitioner to tax non-Indians. *United States* v. *Montana, supra.*

In addition, the Petitioner asserts that it is forced to either repeal its tax ordinance "or suffer the competitive disadvantage of requiring purchasers of its goods on the reservation to pay a double tax." (Pet. at 8.) A similar argument was advanced in *Fort Mojave Tribe* v. *County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). There, the Tribe objected to the imposition of a California possessory interest tax on lessees of trust land held for the Tribe by the United States. The Tribe argued, *inter alia,* that it had its own possesory interest tax and that "double taxation" of the lessee would impede development of the reservation. 543 F.2d at 1255. The court noted as a preliminary matter that it was without the necessary facts to ascertain upon whom the economic burden of the State tax would fall. *Id.* at 1255, n. 2. It was assumed, however, that the economic burden of the tax would possibly fall on the Tribe. *Id.*

In examining the question of whether the imposition of the State tax would constitute an impermissible interference with Indian self-government, the court stated that

> [t]he only effect of the tax on the Indians will be the indirect one of perhaps reducing the revenues they will receive from the leases as a result of their inability to market a tax exemption. Such an indirect economic burden cannot be said to threaten the self-governing ability of the tribe.
>
> The assertion that "double taxation" resulting from the imposition of a tax both by the county and the tribe, impairs the ability of the tribe to levy its tax is not persuasive. There is no improper double taxation here at all, for the taxes are being imposed by two different and distinct taxing authorities. The tribe faces the same problem as other taxing agencies confront when they seek to impose a tax in an area already taxed by another entity having taxing power. We hold that the uncertain economic burden here imposed on the tribe's ability to levy a tax does not interfere with their right of self-government.

Id. at 1258.

In the instant case, the economic burden is also uncertain. In neither *Fort Mojave* nor here was the economic burden resulting from the State tax established as falling upon the Tribes. The court in *Fort Mojave* acknowledged the possibility of an adverse economic burden falling on the Tribe, and, in the instant case, Respondent similarly concedes this theoretical possibility. As in *Fort Mojave,* however, the only effect of the imposition of the Respondent's tax on the Petitioner "will be the indirect one of perhaps reducing the revenues they will receive . . . as a result of their inability to market a tax exemption." *Id.*

IV.

THE COURT OF APPEALS PROPERLY HELD THAT THE DISTRICT COURT'S FINDINGS CONCERNING THE PRESENT BOUNDARIES OF THE UINTAH AND OURAY RESERVATION WERE CLEARLY ERRONEOUS.

A. Boundary litigation concerning the Uintah and Ouray Reservation in other cases.

The reservation boundary issue involved in the present case is not one of first impression, but rather has been raised by Petitioner in *Ute Indian Tribe* v. *State of Utah,* No. C-75-408 (D. Utah, filed October 15, 1975), and has been before this Court in *Appawora* v. *Brough,* 431 U.S. 901 (1977). As discussed *infra* in Part IV(B), the record below in the present case was inadequate for proper determination of the reservation boundary issue, and, as was recognized by the Court of Appeals, the ruling by the District Court was clearly erroneous. (*See* Pet., App. A at A-19.) Therefore, the fact that the reservation boundary can be adequately examined in either of the two cases cited above, or on remand to the District Court in the present case, counsels against granting review by this Court on the issue at this time.

On October 15, 1975, in *Ute Indian Tribe* v. *State of Utah, supra,* Petitioner in this case filed suit against the State of Utah, seeking declaratory and injunctive relief regarding alleged interference by State officials with the enforcement of Petitioner's Law and Order Code on the Uintah and Ouray Reservation. The issue of the location of the exterior boundaries of that reservation was specifically alleged to be a key issue in the case. *See* Complaint, para. 4, App. A at A-2. On September 6, 1976, Judge Willis Ritter granted the Tribe's Motion for a Temporary Restraining Order, enjoining the defendants from relying on the decision of the Utah

Supreme Court in *Brough* v. *Appawora,* 553 P.2d 934 (Utah 1976), in determining the reservation boundaries, and from interfering with enforcement of the Tribe's Law and Order Code on the reservation. App. A at A-6. Subsequently, on October 14, 1976, Judge Ritter issued a preliminary injunction, embodying the terms of the Temporary Restraining Order, and declaring that the Uintah and Ouray Reservation continues to exist within its original boundaries. App. A at A-8. To date, that preliminary injunction has continued in force.[7]

The boundary of the Uintah and Ouray Reservation is also at issue in *Brough* v. *Appawora,* currently before the United States District Court for the District of Utah. No. C-77-0335. In *Brough,* the court is asked to determine the civil jurisdiction of the State over an area on or near the reservation. The *Brough* case involves an automobile accident which occurred on November 12, 1974. The plaintiff received a default judgment on September 9, 1975, on a finding that the defendant had negligently driven his car and injured plaintiff. App. B at B-1 - B-3.

On September 22, 1975, the defendant moved to set aside the judgment, arguing that Utah State courts do not have civil jurisdiction over an enrolled member of an Indian tribe on a reservation. App. B at B-5 - B-14. This motion was denied on December 12, 1975. App. B at B-15. The defendant appealed to the Utah Supreme

[7] Judge Ritter based the issuance of the preliminary injunction in *Ute Indian Tribe* v. *State of Utah, supra,* on his own ruling in the present case. (See Pet., App A at A-3; Preliminary Injunction, Findings of Fact, para. 6.) Since reversal of that decision by the Court of Appeals, the continued validity of the preliminary injunction is questionable.

Court, which found that the Ute Indian Reservation was no longer in existence and that the defendant was properly within the jurisdiction of the State of Utah. *Brough* v. *Appawora,* 553 P.2d 934, 935 (Utah 1976). The Utah Supreme Court relied on a proclamation of President Theodore Roosevelt and a settlement judgment between the Ute Tribe and the United States in reaching this conclusion. *Id.*

The Utah Supreme Court decision was appealed to this Court, which dismissed the appeal for want of jurisdiction but

> [t]reating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted. Judgment vacated and case remanded to the Supreme Court of Utah for further consideration in light of *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. ——, 97 S. Ct. 1361, 51 L.Ed.2d —— (1977).

Appawora v. *Brough, supra.* This Court summarily disposed of the *Appawora* case even though counsel for Appellant, who is counsel for Petitioner here, raised various arguments to demonstrate the adverse impact of the Utah Supreme Court decision on reservation affairs. Appellant's Jurisdictional Statement at 13-16, *Appawora* v. *Brough, supra.* Analogous arguments have been raised by counsel for Petitioner in this case. (Pet. at 7-12.)

On remand, the Supreme Court of Utah allowed the State to intervene as a party plaintiff, App. B at B-16, and remanded the case to the Fourth District for it to determine the boundaries of the reservation. App. B at B-17, B-18. The Fourth District Court of Utah issued a pre-trial ruling, stating that the parties were to present evidence of congressional action relevant to the boundaries of the reservation. App. B at B-19.

The case was removed to Federal district court upon defendant's motion on October 13, 1977, *Brough* v. *Appawora*, No. C-77-0335 (D. Utah), and a status report is scheduled for January 15, 1979.

As will be discussed in Part IV(B), *infra*, the District Court had failed to make a proper record for the boundary determination in the instant case. The proper record may be made by the District Court in this case upon remand if certiorari is denied, or in Federal district court in either *Ute Indian Tribe* v. *State of Utah*, *supra*, or *Brough* v. *Appawora*, *supra*. Denial of certiorari in this case can only hasten the final resolution of the boundary question which has been the root of so much litigation.

B. The District Court's findings in the instant case were properly reversed.

The Court of Appeals reversed the reservation boundary findings of the District Court because it could find no basis for the determination. (Pet. at A-18.) The court below also noted that the issue had not been litigated, and that the District Court's findings on this issue were clearly erroneous. (Pet. at A-18, A-19.) Even the most casual examination of the record will substantiate the conclusions of the Court of Appeals. As such, the utilization of the clearly erroneous standard or any other was not even required. The Respondent, will, nevertheless, demonstrate that the District Court's findings on this issue were clearly erroneous.

The general standard of review for the Court of Appeals in reviewing the Trial Judge's findings of fact in this case under Fed. R. Civ. P., Rule 52(a), 28 U.S.C., is whether " 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been

committed . . .' " *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). *See also McAllister* v. *United States*, 348 U.S. 19, 20 (1954). This standard has been also stated to require that the appellate court be convinced that the trial court's findings of fact "are without adequate evidentiary support in the record, or were induced by an erroneous view of the law . . ." *Baggett* v. *Richardson*, 473 F.2d 863, 865 (5th Cir. 1973). In this case, the Court of Appeals applied the standard properly.

The evidence on the boundary issue before the District Court was not sufficient for it to make any findings of fact concerning the present boundaries of the Uintah and Ouray Reservation. In part, this insufficiency was a function of the complex nature of the question to be determined. It was also the result, however, of the Trial Judge's failure to allow Respondent to present evidence regarding the present boundaries of the Uintah and Ouray Reservation.

The evidence pertaining to reservation boundaries relied upon by the District Court was, *inter alia*, a stipulated fact embodied in the Pre-Trial Order. This stipulation provided "[t]hat the Uintah and Ouray Reservation was created and exists under and pursuant to the Act of Congress of May 5, 1864, (13 Stat. 63) and the laws of the United States." (Pre-Trial Order, Stipulations of Facts, para. 2.) Respondent has steadfastly maintained throughout this case that the Act of May 5, 1864, is but one of the many sources to which a court must look to determine the disestablishment question. The phrase "and the laws of the United States" contained in the stipulation was intended to indicate that more than one historical enactment would be required for examination of this issue. The Respondent has

never indicated that the original and present boundaries of the reservation are the same. The Petitioner, however, implies that they are not only the same, but that the Respondent was in agreement with the Petitioner on its view as to the present boundaries of the reservation throughout the District Court's proceedings. (Pet. at 15, 17.)[8]

An examination of the Pre-Trial Order itself reveals that there was no agreement as to the present exterior boundaries of the reservation. Thus, the general geographic locations on which sales took place were:

> (a) Land which was initially received as part of the original Uintah and Ouray Indian Reservation and is still maintained as part of said reservation;
>
> (b) Land which was initially received as part of the original Uintah and Ouray Indian Reservation but is presently owned in fee title by other individuals, primarily non-Indians, and would include, but not be limited to the cities of Roosevelt and Duchesne;
>
> (c) Land which is not now, and never has been, a part of the Uintah and Ouray Indian Reservation.

(Pre-Trial Order, Stipulations of Fact, para. 14.) Indeed, a stipulated issue of law in the Pre-Trial Order

[8] The Petitioner is even now asserting that Respondent concurs in Petitioner's view on the present boundaries of the reservation. (Pet. at 17.) In this regard, Petitioner notes that Respondent, in its Reply Brief filed with the Court of Appeals, states that the present reservation consists of trust lands. *Id.* The Petitioner claims that this statement is somehow indicative of Respondent's agreement with the Petitioner's view of the present boundaries of the reservation. The Respondent has nowhere claimed that the reservation has been terminated; instead, the Respondent has persistently claimed that the reservation has been disestablished and now occupies a smaller geographic area than that of the original Uintah Reservation and the original Uncompahgre Reservation.

provided that "[i]f an exemption is granted for sales made on a reservation, what constitutes the exterior boundaries of a reservation for purposes of said exemption?" (Pre-Trial Order, Stipulated Issues of Law, para. 18.) It is, of course, obvious that the parties disputed the present exterior boundaries of the reservation prior to trial as evinced by the stipulations contained in the Pre-Trial Order.[9]

At trial, the only evidence allowed to be introduced which directly pertained to the reservation boundaries was the testimony of a realty officer for the Bureau of Indian Affairs. She testified that the reservation boundary established in accordance with an Executive Order of 1861 had been extended by an Executive Order of 1882 and an Act of Congress in 1948, and that the Bureau of Indian Affairs acts in an administrative capacity in relation to only certain portions of the reservation. (R., vol. I, pp. 38-44.) When Respondent attempted to cross-examine the witness, the following exchange took place:

> Q. Have there been any changes within the reservation in lands belonging to the Ute Indians since 1882?
>
> A. Yes.

[9] The Court of Appeals in this case found that the disestablishment issue had not been litigated "due to a misunderstanding as to a provision in the pre-trial orders. . . ." Petition, A-19. While the Respondent did attempt to litigate the issue and was precluded from doing so by the Trial Judge, the "misunderstanding" was not the result of Respondent's failure to properly contest the present boundaries of the reservation. If any stipulation in the Pre-Trial Order could be viewed as adversely affecting Respondent's position on this point, however, it is important to note that an appellate court is empowered to relieve a party from the operation of a stipulation. *See Fairway Construction Co.* v. *Allstate Modernization, Inc.*, 495 F.2d 1077, 1079 (6th Cir. 1974).

The Court: What is the purpose of this?

Mr. Davis: Well, your Honor, it is our contention that there are fee lands which are owned by many other people and which are not part of the reservation.

The Court: But that's irrelevant to this law suit and I don't have all winter now to spend on this matter. Shorten this examination.

Q. (By Mr. Davis) Mrs. Logan, perhaps I could be short and ask you if you are familiar with any changes in allotments which were made by an Act of Congress dated May 27, 1902, if you are familiar with that?

A. There were allotments made within the reservation, yes.

Q. Are you familiar with——

The Court: Well, that is wholely immaterial whether she is familiar with it. It does not tend to prove or disprove any issue in this case whether she is familiar with something.

Q. (By Mr. Davis) Mrs. Logan, does your map, Exhibit, I believe it is 11—in any way show what has since been given or sold or homesteaded by non-Indians?

A. No, it does not.

Q. And are your familiar that that has occurred?

A. Yes.

Q. Mrs. Logan, I will show you what has been marked as Exhibit A and ask you if that purports to be a map which includes four separate sheets which show the various portions of the Uintah Ouray reservation?

A. I am not familiar with this set of maps.

Q. Are you familiar with the lands which are fee lands and those which are still trust lands with Indians?

A. Not without reference to patents and other documents. I certainly don't have them in mind.

Q. Have you attempted to show what those patents and other documents are which affect the title to parts of that land on Exhibit 11?

A. Not on this map. They are not shown.

Mr. Howard: Your Honor, I object to this testimony. The only issue—

The Court: That objection is sustained. We won't pursue that any further. The witness doesn't know anyhow. The witness doesn't have any knowledge on this.

(R., vol. I, pp. 46-47.)

During the hearing of February 25, 1976, to review the District Court's findings, Respondent objected to Findings concerning the reservation boundary. Finding No. 5 provided:

> The Uintah and Ouray reservation was created and exists and its boundaries are established pursuant to executive orders of October 3, 1861, and January 5, 1882, and acts of Congress of May 5, 1863 (13 Stat. 63), and March 11, 1948 (62 Stat. 72), and the laws of the United States.

Counsel for Respondent stated:

> No. 5 I object to. The basis for this objection was the testimony given by Mrs. Logan, who on cross-examination noted that there were many other executive orders and statutes which pertained to establishing the boundaries of that particular reservation. I don't believe that No. 5 includes all of

> the applicable orders and boundaries that would apply.

When the District Court questioned the importance of the objection, Respondent replied:

> It is important because the boundaries have changed over the years considerably.

(R., vol. II, pp. 6-7.)

Counsel for the Petitioner then asserted:

> If the court please, half of this particular finding of fact was stipulated to in paragraph 2 of the Pre-Trial Order and the rest of it represents the direct testimony of Mrs. Logan on the witness stand. *As far as we know, these are the only statutes that are purported to define the exterior boundaries of the reservation.*

(R., vol. II, p. 7; Emphasis added.)

The Respondent asserted once again that there had been many changes over the years "establishing what the boundaries are". (R., vol. II, p. 7.)

The Respondent later made the following objection—unsuccessfully—with respect to the boundary determination:

> We object to that only on the basis we don't believe the exterior boundaries have been properly established due to the changing executive orders and changing statutes.

(R., vol. II, p. 19.)

On May 27, 1976, Respondent filed an Amended Motion for New Trial and asserted, *inter alia,* that the District Court erred as a matter of law in determining

the boundaries of the Uintah and Ouray Indian Reservation because the court had failed to take into consideration certain acts, amendments and proclamations that had changed the exterior boundaries of the Uintah and Ouray Indian Reservation. During the hearing on that Motion, the Respondent argued:

> Mr. Deamer: There is one second point that I wish to bring to the court's attention dealing with establishing the exterior boundaries of that Reservation. In our pre-trial order we stipulated that the Ouray Uintah Indian reservation initially was created by one act of Congress in 1864, and later as the conclusions of law came down it recited other legislation that had subsequently occurred that had been briefly alluded to by witnesses, but had not been examined in detail, and I feel there is other federal legislation that ought to be examined and a basis of our motion for a new trial is that we re-examine this issue establishing the exterior boundaries.
>
> The Court: Why didn't you do so at the trial?
>
> Mr. Deamer: We attempted to and were not able to and there were other factors——
>
> The Court: Why weren't you able to?
>
> Mr. Deamer: Well, we started talking about the general allotment act and some others and there was an objection to going into that line of questioning which was sustained by the court.
>
> The Court: Your motion for a new trial is denied.

(R., vol. III, p. 8.)

The findings of fact by the District Court were without adequate evidentiary support and were induced by an erroneous view of the law. At the time the District Court made its findings of fact, the question of whether

the boundaries of a reservation had been disestablished or terminated was to be determined by examining the face of the Act said to disestablish or terminate, the circumstances surrounding its enactment, and its legislative history. *DeCoteau* v. *District County Court,* 420 U.S. 425, 444 (1975).[10]

It is readily apparent from an examination of the District Court record below that a reservation boundary decision should not have been made. [11] As indicated by the *Rosebud* and *DeCoteau* decisions, an exhaustive analysis of a variety of materials is needed for the proper resolution of boundary disputes. Judge Ritter either refused to follow the standards announced in *DeCoteau* or was not aware of them.[12] To base its decision on reservation boundaries without considering evidence in conformity with boundary question standards offered by the Respondent, indicates that the District Court was proceeding under an erroneous view of the proper legal standards. The District Court's findings of fact on this issue were without weight, and mandated reversal. *Compare Tyler* v. *Insurance Company of North America,* 539 F.2d 1072, 1074 (5th Cir. 1976), *with Hallberg* v. *Hillburn,* 434 F.2d 90, 91 (5th Cir. 1970).[13]

Moreover, the District Court's refusal to allow Respondent to submit evidence on this issue could only serve to reinforce the ruling of the Court of Appeals. When a trial court prevents a party from presenting evidence pertinent to an issue in a case, findings of fact are entitled to less weight than they would have been accorded had the evidence been allowed to have been presented. *Watkins* v. *Scott Paper Co.,* 530 F.2d 1159, 1172 (5th Cir.), *cert. denied,* 429 U.S. 861 (1976).

In addition to the foregoing considerations which support the holding of the Court of Appeals on this issue, two others merit attention. First, the District Court entered its findings without any supporting analysis. In such cases, the reviewing court will more closely scrutinize the findings of fact in determining whether they are clearly erroneous. *See Commissioner* v. *Duberstein,* 363 U.S. 278, 292-93 (1960); *Russo* v.

[10] A more recent statement of this standard was enunciated in *Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 584 (1977). There, this Court stated that in cases where the boundaries of a reservation are in question, "'the face of the Act,' the 'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what Congressional intent was. . . ." *Id.* at 587.

[11] That the Petitioner even attempts to claim that the District Court ruling was proper is not without irony. In its proposed Pre-Trial Order in *Ute Indian Tribe* v. *State of Utah, supra,* the Petitioner noted that the present boundaries of the reservation were in issue, and did not suggest that the District Court decision in this case had any preclusive effect which would bar relitigation of the issue. In addition, the Petitioner fails to note that in *Appawora* v. *Brough, supra,* this Court remanded the case for a proper boundary analysis and record under *Rosebud.* To argue that Judge Ritter's findings here were any closer to the mark than the analysis by the Utah Supreme Court in *Brough* v. *Appawora, supra,* would be utterly inconsistent. This may, in part, explain Petitioner's failure to note this Court's action in *Appawora* v. *Brough, supra.*

[12] In fact, it is even questionable that the District Court was aware that the present reservation boundaries were an issue in the case. (R., vol. I, pp. 45-47.)

[13] It is also to be noted that when findings are predicated upon an erroneous interpretation of the standard to be applied, the reviewing court is merely reviewing the question of law of whether the proper standard has been applied. *See United States* v. *Singer Manufacturing Co.,* 374 U.S. 174, 193 (1963). The question of whether the Court of Appeals properly applied the "clearly erroneous" standard in this case would thus become irrelevant.

Central School District No. 1, Towns of Rush, et. al., New York, 469 F.2d 623, 628 (2d Cir. 1972). Secondly, the District Court adopted the Petitioner's proposed findings, conclusions of law, and order without modification. As such, the Court of Appeals was warranted in making "the most searching examination for error" in this case. *In re Las Colinas, Inc.,* 426 F.2d 1005 (1st Cir. 1970), *cert. denied,* 405 U.S. 1067 (1972).

Thus, the Court of Appeals has ruled correctly in holding that the District Court's findings were clearly erroneous.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT B. HANSEN
Utah Attorney General

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Attorneys for Respondent

October, 1978

APPENDIX

APPENDIX A

Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

THE UTE INDIAN TRIBE, *Plaintiff*,

VS.

THE STATE OF UTAH, DUCHESNE COUNTY, a Political Subdivision of the State of Utah, ROOSEVELT CITY, a Municipal Corporation, and DUCHESNE CITY, a Municipal Corporation, *Defendants*.

Civil Action No. C-75-408

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff complains against defendants and alleges as follows:

1. This is an action under 28 U.S.C. Sections 2201 and 2202 for Declaratory Judgment, injunctive and other relief as may be necessary and proper. This Court has jurisdiction by virtue of 28 U.S.C. Section 1362. An actual justiciable controversy exists between plaintiff and defendants, with adverse interests, which is not possible of settlement without a judicial determination declaring the rights and obligations of the parties. Further said controversy admits of an immediate and definitive determination of the legal rights of the parties and is capable of specific relief as appears at length from the allegations of the Complaint.

2. Plaintiff is a sovereign American Indian Tribe, organized pursuant to the Act of Congress of June 18, 1934, (48 Stat. 984), 25 U.S.C. § 461, et seq., as amended, with its governing body duly recognized by the Secretary of the

Interior, and its existence is within Federal jurisdiction and is governed by the laws of the United States.

3. Defendant State of Utah is a sovereign state of the United States; defendant Duchesne County is a political subdivision of the State of Utah, and defendants Roosevelt City and Duchesne City are municipal corporations within the State of Utah.

4. That the Uintah and Ouray Reservation was created and exists under and pursuant to Act of Congress of May 5, 1864, (13 Stat. 63) and March 11, 1948, (62 Stat. 72) and the laws of the United States, is sovereign "Indian Country", and plaintiff has jurisdiction throughout and within the exterior boundaries of said reservation as is more fully set forth in plaintiff's Law and Order Code.

5. Plaintiff has at no time by agreement or otherwise submitted to jurisdiction or ceded jurisdiction to the State of Utah or to any of the defendants over members of the Tribe within the reservation, nor has there been any enactment by Congress providing that the State of Utah or any of the defendants can exercise jurisdiction over any members of the Tribe within the reservation. Specifically, plaintiff has never accepted either civil or criminal jurisdiction of the State of Utah pursuant to 25 U.S.C. § 1321 et seq., and Section 63-36-9, et seq., Utah Code Annotated, 1953.

6. Pursuant to authority granted to the Tribal Business Committee in Paragraph VI of the Constitution and Bylaws of the Ute Indian Tribe of the Uintah and Ouray Reservation, plaintiff, through its Tribal Business Committee, has enacted a Law and Order Code effective September 15, 1975. The Law and Order Code, with the exception of Titles 14 and 15 thereof, has been approved by the Superintendent of the Uintah and Ouray Reservation and approved by the Phoenix Area Director of the Phoenix Area Office of the Bureau of Indian Affairs as the delegate of the Secretary of the Interior and acting for and on behalf of the Secretary of the Interior, all as required by

Section 2 of Article VI of the Constitution and Bylaws of the Tribe, and is presently in full force and effect within the exterior boundaries of plaintiff's reservation.

7. Upon information and belief, plaintiff alleges that on numerous occasions commencing on or about September 13, 1975, and continuing to the present time, defendant Duchesne County, by and through its Sheriff and other elected officials, has publicly stated that it will ignore or defy the provisions of plaintiff's Law and Order Code and has encouraged citizens of said County within the exterior boundaries of plaintiff's reservation to do likewise.

8. On the 30th day of September, 1975, defendant Roosevelt City, through a duly constituted meeting of the City Council, adopted a resolution affirmatively asserting that plaintiff has no jurisdiction whatsoever over persons or properties, including Indians, within the territorial limits of the City. A copy of said resolution, marked Exhibit "A", is attached hereto and by reference made a part hereof.

9. Upon information and belief, plaintiff alleges that on the 22nd day of September, 1975, the Mayor and members of the City Council of the City of Duchesne publicly stated that in their official capacity, they did not and would not recognize the efficacy of plaintiff's Law and Order Code and encouraged all residents, Indian and non-Indian, of their City to resist its application.

10. Upon information and belief, plaintiff alleges that on the 14th day of October, 1975, defendant, The State of Utah, by and through its Governor and Chief Executive Officer, called upon local officials and citizens of the State residing within the exterior boundaries of the reservation to disregard citations resulting from violations of plaintiff's Tribal Code.

11. Upon information and belief, plaintiff alleges that on the 15th day of October, 1975, defendant, The State of Utah, by and through its Governor and Chief Executive

Officer, by letter requested the Attorney General of the State of Utah to commence prosecution of an action intended to abrogate the effectiveness of the aforesaid Law and Order Code over members of plaintiff's Tribe within the exterior boundaries of its reservation.

12. That by reason of these conflicting claims, great doubt has been cast on the validity of plaintiff's Law and Order Code, and plaintiff has been rendered incapable of enforcing said Code without jeopardizing the public safety of all residents of the reservation, and therefore an actual controversy exists which presently requires this Court to declare plaintiff's Code, duly adopted by its governing body, to be a legal and valid exercise of legislative authority and to be in full force and effect within the exterior boundaries of plaintiff's reservation, and to further declare that defendants are without any authority to do anything whatsoever that will in any way conflict or interfere with the implementation of said Code or the enforcement thereof.

WHEREFORE, plaintiff, the Ute Indian Tribe, prays that the Court adjudge:

1. That plaintiff is a sovereign American Indian Tribe organized pursuant to the Act of Congress; that the Uintah and Ouray Reservation is an Indian Reservation established pursuant to the Act of Congress and is within Federal jurisdiction and governed by the laws of the United States; and that defendants have no jurisdiction or authority to in any way interfere with plaintiff's sovereign powers or with any activities or business of the plaintiff on the Uintah and Ouray Reservation.

2. That plaintiff's Law and Order Code aforesaid is in full force and effect within the exterior boundaries of plaintiff's reservation.

3. That each of the defendants be enjoined and restrained from interfering with the implementation or enforcement of said Code.

4. That plaintiff recover its costs herein.

DATED th' 15th day of October, 1975.

/s/ STEPHEN G. BOYDEN
Stephen G. Boyden
Attorneys for Plaintiff
1000 Kennecott Building
Salt Lake City, Utah 84133

Temporary Restraining Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

THE UTE INDIAN TRIBE, *Plaintiff*,

vs.

THE STATE OF UTAH, DUCHESNE COUNTY, a Political Subdivision of the State of Utah, ROOSEVELT CITY, a Municipal Corporation, and DUCHESNE CITY, a Municipal Corporation, *Defendants*.

Civil Action No. C-75-408

TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE

This matter having come before the Court on plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, the Court having considered the pleadings on file herein, including plaintiff's Motion and the Affidavit of F. Burton Howard filed in support of the Motion, and good cause appearing therefore,

IT IS HEREBY ORDERED that defendants and all officers and agents of defendants are temporarily restrained from enforcing the judgment in *Brough* v. *Appawora*, District Court of Uintah County, Civil No. 7648, *aff'd*, Utah Supreme Court, No. 14434, August 17, 1976, pending determination of plaintiff's request for a preliminary injunction, herein, and

IT IS FURTHER ORDERED that defendants and all officers and agents of defendants are temporarily restrained from relying on the decision in *Brough* v. *Appawora* to exercise any form of criminal or civil jurisdiction that interferes with any activities or business of the plaintiff on the Uintah

and Ouray Reservation, pending determination of plaintiff's request for a preliminary injunction, herein, and

IT IS FURTHER ORDERED that defendants appear before this Court of the ..... day of ....., 1976, at ..... o'clock ....M., then and there to show cause, if any they have, why an order should not be made temporarily enjoining and restraining defendants, their officers and agents from enforcing the judgment in *Brough* v. *Appawora* or relying on the decision therein, as prayed for by plaintiff, and

IT IS FURTHER ORDERED AND DIRECTED that service on the defendants of this Temporary Restraining Order and Order to Show Cause and of the papers on which the same has been granted shall be deemed sufficient notice of plaintiff's application for a preliminary injunction and of hearing thereon.

DATED this 6 day of September, 1976.

/s/ WILLIS RITTER
Willis Ritter

Judge, United States District Court

Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

THE UTE INDIAN TRIBE, *Plaintiff*,

VS.

THE STATE OF UTAH, DUCHESNE COUNTY, a Political Subdivision of the State of Utah, ROOSEVELT CITY, a Municipal Corporation, and DUCHESNE CITY, a Municipal Corporation, *Defendants*.

Civil Action No. C-75-408

PRELIMINARY INJUNCTION

This matter having come before the Court on plaintiff's Motion for Preliminary Injunction and the Court having considered the pleadings on file herein and the Affidavit of F. Burton Howard filed in support of said Motion and the Motion to Vacate Temporary Restraining Order and Response to Order to Show Cause filed by defendants in opposition thereto and having heard representations of counsel in open court, the Court now makes the following

FINDINGS OF FACT

1. Plaintiff is a sovereign American Indian Tribe organized pursuant to Act of Congress of June 18, 1934 (48 Stat. 984) with its governing body duly recognized by the Secretary of the Interior and its existence is within federal jurisdiction and is governed by the laws of the United States.

2. Plaintiff's reservation was created under and pursuant to Acts of Congress of May 5, 1864 (13 Stat. 63), August 15, 1894 (28 Stat. 286, 377) and March 11, 1948 (62 Stat. 72) and other laws of the United States including the Executive Orders of Oct. 3, 1861 (I Kappler 900) and January 5, 1882 (I Kappler 901). The original confines of the reservation included the entire Uintah Valley of the Territory of Utah.

3. Plaintiff has never accepted either criminal or civil jurisdiction of the State of Utah in accordance with 25 U.S.C. Section 1321 et seq. and 63-36-9 et seq. Utah Code Annotated, 1953.

4. Plaintiff has duly enacted a Law and Order Code and has vested jurisdiction in plaintiff's Tribal Court to hear and decide civil and criminal cases involving the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, or a member of a federally recognized Indian Tribe, or the rights of any of the foregoing, in any case, claim, crime or cause of action arising on property, the title to which is held in trust for the plaintiff by the United States.

5. On numerous occasions commencing on or about September 13, 1975, and continuing to the present time, defendant Duchesne County, by and through its sheriff and other elected officials, has publicly stated that it will ignore or defy the provisions of said Law and Order Code and has encouraged citizens of said county within the exterior boundaries of plaintiff's reservation to do likewise.

6. That since the commencement of this action, defendants, their officers or agents, have continued to claim and exercise jurisdiction over plaintiff, its property, enterprises, agents, employees, and members of its Tribe within the confines of plaintiff's reservation in contravention of the laws of the United States and the rulings of this Court and will continue to engage in such practices unless restrained.

7. That the case of *Brough* v. *Appawora*, No. 14434, decided by the Supreme Court of the State of Utah on August

17, 1976, purports to rule on the very issues pending before this Court in this action and asserts jurisdiction over plaintiff, its officers, agents, employees, property, enterprises or the members of plaintiff's tribe and otherwise interferes with the operation of plaintiff's Law and Order Code.

8. Because of these facts, plaintiff will suffer irreparable injury unless defendants are restrained during the pendency of this action and any judgment that this Court may render in final determination of this cause will be to that extent of no effect.

On the basis of the foregoing the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has exclusive jurisdiction over the subject matter of this action under Section 1362 of Title 28, U.S.C.

2. That defendants, their officers and agents, employees, attorneys, and all persons in active consort or participation with any of them, should be restrained from exercising or assuming any form of criminal or civil jurisdiction based upon the case of *Brough* v. *Appawora,* or otherwise, over any civil or criminal matter involving the Tribe, its officers, agents, employees, property or enterprises or a member of the Tribe, or interfering with the operation of plaintiff's Law and Order Code, within the original exterior boundaries of the plaintiff's reservation as set forth in the Executive Orders and Acts of Congress referred to in paragraph 2 of the Findings of Fact herein.

3. That plaintiff should not be required to file an undertaking since it does not appear that any damages will result or be suffered by any party who is found to be wrongfully enjoined or restrained herein, and it is therefore

ORDERED, that defendants, their officers and agents, employees, attorneys, and all persons in active consort or participation with any of them be and the same are hereby restrained from exercising or assuming any form of criminal or civil jurisdiction based on the case of *Brough* v. *Appawora,* or otherwise, over any civil or criminal matter involving the Tribe, its officers, agents, employees, property or enterprises or a member of the Tribe within the confines of the plaintiff's reservation as defined herein pending a final determination of this action; and it is further

ORDERED, that no undertaking need be filed by the plaintiff.

DATED this 14 day of October, 1976.

/s/ WILLIS RITTER
Willis Ritter

Judge, United States District Court

APPENDIX B

Default Judgment

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

MYRON BROUGH, *Plaintiff*

vs.

RAMON R. APPAWORA, *Defendant*

DEFAULT CERTIFICATE

THE STATE OF UTAH TO THE SAID DEFENDANT:

In this action the defendant having been regularly served with process, and having failed to appear and answer the Plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law.

WITNESS, the Clerk of said court, with the seal thereof attached, this 26 day of August, A.D., 1975.

/s/ MORRIS R. COOK, Clerk.
/s/ ROENA LIGHT, Deputy Clerk

Findings of Fact and Conclusions of Law

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

MYRON BROUGH, *Plaintiff*,

vs.

RAMON R. APPAWORA, *Defendant*.

The above-entitled case came on before the Court on the 26th day of August, 1975, on the regular law and motion calendar, the Honorable Allen B. Sorensen, District Judge, presiding, and the default of the defendant having been entered by the clerk after the expiration of twenty days from the date of personal service upon the defendant, and the plaintiff having been sworn and testified, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff was a pedestrian in Uintah County, State of Utah, on November 13, 1974.

2. On that date, defendant who was a driver of a motor vehicle, failed to maintain a proper look-out and drove his vehicle in a manner in which he could not maintain control and was intoxicated, negligently drove his vehicle into a stalled Ute Indian tribal truck which thereafter collided with a motor vehicle owned and driven by Blaine Brough, with plaintiff standing between the latter two vehicles at the time of impact.

3. The foregoing acts on behalf of defendant are the approximate and contributory cause to injuring plaintiff, who has sustained injuries to both knees, his hand, and back.

4. As a result of being injured, plaintiff has sustained special damages in the sum of $800, loss of wages and

earnings from the date of injury until date of default in the proceeding in the sum of $3,000.00 and has, because of the partial permanent future disability as well as pain and suffering sustained general damages in the sum of $25,000.

The Court, having made the Findings of Fact, now makes the following:

CONCLUSIONS OF LAW

1. Defendant was negligently driving his vehicle which proximately contributed to the injuries plaintiff sustained.

2. Plaintiff has been damaged as a result of defendant's negligence in the sum of $28,000.00 for partial and future general damages and for the sum of $800.00 special damages.

DATED this 9 day of September, 1975.

BY THE COURT:
/s/ ALLEN B. SORENSEN
District Judge

B-4

Judgment

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

MYRON BROUGH, *Plaintiff*,

VS.

RAMON R. APPAWORA, *Defendant*.

The Court having made its Findings of Fact and Conclusions of Law, herewith enters judgment in favor of plaintiff and against defendant in the sum of TWENTY-EIGHT THOUSAND EIGHT HUNDRED DOLLARS ($28,800.00) for general and special damages and THIRTY-THREE DOLLARS ($33.00) for costs of Court.

DATED this 9 day of September, 1975.

BY THE COURT:
/s/ ALLEN B. SORENSEN
District Judge

B-5

Special Appearance and Motion to Set Aside Default and Default Judgment and To Dismiss

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

MYRON BROUGH, *Plaintiff*,

VS.

RAMON R. APPAWORA, *Defendant*.

COMES Now the Defendant, appearing specially through counsel, and, pursuant to Rules 55(c) and 60(b) of the Utah Rules of Civil Procedure, moves the Court to set aside the default and default judgment entered herein and dismiss Plaintiff's Complaint.

As grounds for this Motion, Defendant states that this Court lacks jurisdiction over both the Defendant and the subject matter and that the judgment herein is therefore void.

A Memorandum and supporting affidavits in support of this Motion are attached hereto.

This Motion shall be handled according to Rule 20 of the Rules of Practice of this Court.

Respectfully submitted this 22nd day of October, 1975.

BOYDEN, KENNEDY, ROMNEY & HOWARD
/s/ SCOTT C. PUGSLEY
Scott C. Pugsley
Attorneys for Defendant
1000 Kennecott Building
Salt Lake City, Utah 84133

Memorandum in Support of Special Appearance and Motion to Set Aside Default and Default Judgment and To Dismiss

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

MYRON BROUGH, *Plaintiff*,

VS.

RAMON R. APPAWORA, *Defendant*.

The Defendant, through counsel, submits this Memorandum in Support of his Special Appearance and related motions.

I. BACKGROUND

The pleadings, attached affidavits and officers report establish the following:

(1) That the Defendant is an enrolled member of the Ute Indian Tribe of the Uintah and Ouray Reservation.

(2) That the Defendant resides within the boundaries of the Uintah and Ouray Reservation.

(3) That the accident, which is the subject matter of this lawsuit, occurred within the exterior boundaries of the Uintah and Ouray Reservation.

(4) That the Ute Indian Tribe is a federally recognized Indian tribe exercising the powers of self-government within the exterior boundaries of the Uintah and Ouray Reservation, never having consented to the civil jurisdiction of the State of Utah.

(5) That the Ute Indian Tribe has a functioning Tribal Court.

II. LACK OF JURISDICTION OVER THE SUBJECT MATTER

The Complaint herein seeks determination of the liability of a Reservation Indian for an accident occurring within

his Reservation. It is the position of the Defendant, appearing specially herein, that this Court lacks subject matter jurisdiction so to decide.

The extent to which state courts can exercise civil jurisdiction over Indians living on a reservation has been examined by the U.S. Supreme Court in the case of *Williams* v. *Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959). That case involved an attempt by a non-Indian proprietor of a general store located on the Navajo Indian Reservation to collect a money judgment against two Navajo residents of the reservation in an Arizona state court for goods sold on credit. The Arizona State Court affirmed the jurisdiction of the state court to adjudicate the matter, and the U.S. Supreme Court *reversed*, saying:

> Essentially, absent governing Acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and to be ruled by them. Cf. Utah and Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246.
>
> Congress has also acted consistently upon the assumption that the states have no power to regulate the affairs of Indians on the reservation. *Ibid.*, 30 L.Ed. 2d p. 254.
>
> • • •
>
> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over reservation affairs and hence would infringe on the rights of Indians to govern themselves. *Ibid.*, p. 255.

An illuminating and forceful reaffirmation of these principles is found in the recent case of *McClanahan* v. *Arizona Tax Commission*, —— U.S. ——, 36 L.Ed. 2d 129, 93 S.Ct. —— (1973). The right of reservation Indians to be governed by tribal law free from state interference is stated in the plainest terms in this case.

The general applicability of this principle has been recognized in 41 Am. Jur. 2d Indians § 63, which states:

> The jurisdiction of the Federal Government over Indian tribes and over the members of such tribes while they are on Indian reservations being exclusive, such Indians, while they are on their reservations, cannot be controlled or governed by the laws of the states within which the reservations are located. * * * Nor can the state courts assume jurisdiction on a controversy involving Indians, where such controversy arose out of a transaction occurring on the reservation or where an Indian tribe is the defendant. * * * If the tribal relation is still recognized by the United States as existing, the fact that the primitive habits of the Indians have been modified by their intercourse with the whites does not authorize a state to treat them as subject to its laws.

The decisions of numerous state Supreme Courts affirm this principle of lack of state court jurisdiction over the affairs of reservation Indians. See ***Wauneha*** v. ***Campbell,*** 526 P.2d 1085 (Ariz. 1974); *Martin* v. *Denver Juvenile Court,* 493 P.2d 1093 (Colo. 1972); *Blackwolf* v. *District Court of the Sixteenth Judicial District,* 493 P.2d 1293 (Mont., 1972); *State ex rel Kennerly* v. *District Court,* 466 P.2d 85 (Mont., 1970); *Makah Indian Tribe* v. *State,* 457 P.2d 590 (Wash., 1969); *Boyer* v. *Shoshone-Bannock Indian Tribes,* 441 P.2d 167 (Idaho, 1968); *State* v. *Bertrand,* 378 P.2d 427 (Wash., 1963).

The Utah Supreme Court has held that:

> The Indian tribes have not entirely lost their character as sovereign entities, but retain a substantial degree of autonomy under which they may and do operate independent of state government. They have the power to adopt a constitution, enact tribal laws to which members of the tribe are subject * * *. *Allen* v. *Merrill,* 6 Utah 2d 32, 305 P.2d 490 (1956).

A comment in the Utah Law Review, "The 'Right of Tribal Self-Government' and Jurisdiction of Indian Affairs," 1970:291 at 301 states:

> It is suggested, therefore, that when deciding whether a particular legal controversy falls within the realm of tribal self-government, a court should consider: (1) Whether those principally involved in the controversy are Indians, non-Indians, or both; (2) If the controversy occurred on the reservation; (3) Whether the matter is essentially one of tribal concern or custom; (4) whether the matter is one which a local city government would have authority to control; and (5) If the application of Indian law can be justified as necessary for the maintenance of Indian culture.

As indicated in the quotation from the ***Williams*** case, *supra,* Congress has consistently recognized the lack of state court jurisdiction over Indians on their reservation. In recognition of this fact, the 1968 Congress passed an act giving the consent of the United States to the assumption by the states of criminal and/or civil jurisdiction over Indian reservations, but only after both the state and the tribe have, by affirmative action, concurred in such result. See 25 U.S.C.A. § 1321 *et seq.* Pursuant to this authority granted by Congress, the State of Utah has consented to assume jurisdiction over Indians and Indian territory located with the State. See §§ 63-36-9 to 63-36-17 Utah Code Annotated, 1953. However, as required by the Federal legislation, the Utah act requires that such assumption of jurisdiction will be effective *only* upon acceptance by the tribe involved of such jurisdiction. See § 63-36-10, UCA, 1953. The Ute Indian Tribe of the Uintah and Ouray Indian Reservation has not done so and, consequently, no civil or criminal jurisdiction has passed to the State as a result of these enactments. (See Affidavit of William Streitz).

If the State of Utah presently had civil jurisdiction over the Uintah and Ouray Indian Reservation, § 63-36-13 UCA, 1953, of the aforementioned act providing for "Civil Jurisdiction" would have been unnecessary and an idle gesture on the part of the legislature. Since, however, both the Federal and the State legislatures have recognized that the State does not have such jurisdiction absent such an enactment, it must necessarily be concluded that the states did not have civil jurisdiction over enrolled Indians on their reservations before these enactments, and that Utah still does not have such jurisdiction since the Ute Tribe has not consented to such.

This specific point has been affirmed by the U.S. Supreme Court in the case of *Kennerly* v. *District Court of Montana,* 400 U.S. 423, 27 L.Ed. 507, 91 S.Ct. 480 (1971). In this case, civil jurisdiction was denied a state court over a cause of action arising on a reservation and involving an Indian even though the Tribe had attempted to vest such authority in the State. Since the procedural formalities of 25 USC § 1321 *et seq.* had not been fully complied with, the Montana State Court was denied jurisdiction. The case of *McClanahan* v. *Arizona Tax Commission, supra,* affirms the *Kennerly* decision to the effect that absent compliance with 25 USC § 1322, state courts can exercise neither civil nor criminal jurisdiction over reservation Indians. See *McClanahan,* 36 L.Ed. 2d at 139, especially footnote 19. See also *Poitra* v. *Demarrias,* 502 F.2d 23 (8th Cir., 1974); *Wauneka* v. *Campbell, supra.*

It should further be noted that both the Utah Enabling Act and the Utah Constitution contain almost identical language to the effect that the State disclaims all right and title to all Indian lands within the State and that,

> . . . Until title thereto shall have been extinguished by the United States, * * * said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. Utah Constitution, Art. III, paragraph "Second." See also the Utah Enabling Act, § 3, paragraph "Second."

It is interesting to note, as did the U.S. Supreme Court regarding Arizona in *McClanahan* v. *Arizona Tax Commission, supra,* that the language of the Utah Constitution and Enabling Act are paralleled in the Arizona Enabling Act from which the Supreme Court quoted in the *McClanahan* case to support its denial of Arizona state jurisdiction over certain Arizona Indians.

The Congress of the United States has established a scheme for handling the judicial needs of reservations such as that of the Utes, and, within the realm of its stated authority, such judicial system must be deemed to be both exclusive and supreme vis a vie, the State. To handle the judicial needs of the Uintah and Ouray Indian Reservation, both civil and criminal, there is established and functioning on the reservation a Tribal Court, Tribal Juvenile Court, and Tribal Appellate Court. Part II of Subchapter B of Title 25 of the Code of Federal Regulations deals with the subject of "Law and Order on Indian Reservations," and provides a general procedural and substantive law framework for Indian tribal courts. 25 CFR § 11.1, "Application of Regulations," provides as follows:

> (a) The regulations in this part relative to Courts of Indian Offenses shall apply to all Indian reservations on which such Courts are maintained.
>
> (b) It is the purpose of the regulations in this part to provide adequate machinery of law enforcement for those Indian tribes in which traditional agencies for the enforcement of tribal law and custom have broken down for which no adequate substitute has been provided under Federal or State law.
>
> * * *
>
> (e) Nothing in this section shall prevent the adoption by the tribal council of ordinances applicable to

> the individual tribe, *and after such ordinances have been approved by the Secretary of the Interior they shall be controlling, and the regulations of this part which may be inconsistent therewith shall no longer be applicable to that tribe.* [Emphasis added.]

It should be noted in regard to this section that the State of Utah has not provided an "adequate substitute" for the Court of Indian Offenses, and that the Tribal Courts for the Uintah and Ouray Indian Reservation retain jurisdiction over the Reservation, concurrent only with the federal courts.

It should further be noted that the Ute Indian Tribe, by its Tribal Business Committee, has adopted a Tribal Law and Order Code establishing a Tribal Court to hear all cases involving tribal members. Pursuant to Subsection (e) of 25 CFR § 11.1 quoted above, this Code becomes the governing law for use by the Tribal Courts on the Reservation. This Court should not and cannot assume jurisdiction in derogation of the Tribal Court's authority.

25 CFR § 11.2 "Jurisdiction" provides in Subsection (c) as follows:

> For the purpose of the enforcement of the regulations in this part, an Indian shall be deemed to be any person of Indian descent who is a member of any recognized Indian tribe now under Federal jurisdiction, and a "reservation" shall be taken to include all territory within reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

The Tribal Law and Order Code contains a provision of identical effect.

Clearly, the Tribal Court is the appropriate forum to hear this matter. The weight of authority is *against* the assumption of jurisdiction by a state court under these circumstances.

III. Lack of Jurisdiction Over the Person—Ineffectiveness of State Process On An Indian On His Reservation

Felix Cohen's authoritative volume on *Federal Indian Law* states as follows:

> It is well settled that the State has no power over the conduct of Indians within the Indian country, whether or not the conduct is of special concern to the Federal Government. Cohen's *Federal Indian Law*, p. 120; citing *U.S.* v. *Quiver*, 241 U.S. 602 (1916).

Two statements in a recent Utah Law Review article on Indian jurisdiction should be noted in regard to service of state process on a reservation Indian.

> With respect to cases involving Indian defendants, *Williams* v. *Lee* has made a sizeable dent in general jurisdiction: subject matter connected with the reservation is excluded from state court jurisdiction irrespective of where the Indian defendant has been served with process. 1973 Utah L. Rev. at 222.
>
> Traditionally, the courts have held that personal service of process cannot be effected while an Indian is on the reservation. Ibid. at 225.

See also *Langford* v. *Monteith*, 102 U.S. 145, 147 (1880).

Both the Colorado and Montana Supreme Courts have recently rejected the efficacy of state process served on reservation Indians on their reservation. See *Martin* v. *Denver Court, supra;* and *Blackwolf* v. *District Court of Sixteenth Jud. Dist., supra.*

The provisions of the Utah Enabling Act and Constitution quoted under Point I, *supra,* especially when read in light of the holding of the U.S. Supreme Court in the *McClanahan* case, *supra,* further emphasized the lack of state

jurisdiction over the area of an Indian reservation as far as reservation Indians are concerned.

No provision of Utah law has been found which would purport to give state court issued process validity against a reservation Indian.

This Court cannot, as a matter of law, assume jurisdiction over the Defendant to determine his personal liability.

IV. Conclusion

The default judgment entered herein should be set aside and the complaint dismissed for lack of jurisdiction over both the Defendant and the subject matter.

Dated: October 22, 1975

Boyden, Kennedy, Romney & Howard

/s/ Scott C. Pugsley
Scott C. Pugsley
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Denial of Motion to Set Aside Default Judgment

IN THE DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil No. 7648

Myron Brough, *Plaintiff*,

vs.

Ramon R. Appawora, *Defendant*.

Order

The above-entitled case came on for hearing on the motion of the Ute Indian Tribe to set aside the default judgment against defendant and to dismiss plaintiff's cause of action on the grounds of lack of jurisdiction over the defendant and over the subject matter, the Court having heard argument of counsel and being fully appraised in the premises,

Now, Therefore, It Is Ordered that the motions on file herein to vacate the judgment are herewith denied.

Dated this 12 day of December, 1975.

By the Court:
/s/ Allen B. Sorensen
Allen B. Sorensen
District Judge

B-16

Intervention of the State of Utah as Party Plaintiff

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

June 21, 1977

OFFICE OF THE CLERK
Robert B. Hansen, Esquire
Attorney General
Building

MYRON BROUGH, *Plaintiff and Respondent,*

v.

RAMON R. APPAWORA, *Defendant and Appellant.*

No. 14434

This day motion of State of Utah to intervene as a party plaintiff is granted insofar as it permits the State of Utah to become a party to the proceeding in this Court.

Geoffrey J. Butler, Clerk

B-17

Remand to Utah District Court

SUPREME COURT OF UTAH
STATE OF UTAH
SALT LAKE CITY, UTAH

July 5, 1977

OFFICE OF THE CLERK
DALLIN W. JENSEN
ASSISTANT ATTORNEY GENERAL
Building

No. 14434

MYRON BROUGH, *Plaintiff and Respondent,*

v.

RAMON R. APPAWORA, *Defendant and Appellant.*

This day the above case remanded to the Fourth District.

Geoffrey J. Butler, Clerk

IN THE SUPREME COURT OF THE STATE OF UTAH

No. 14434

July 5, 1977

MYRON BROUGH, *Plaintiff and Respondent,*

v.

RAMON R. APPAWORA, *Defendant and Appellant.*

This case is sent to Honorable Allen B. Sorensen, District Judge of the Fourth District, for a determination of facts in the light of the decision of the United States Supreme Court in the case of Rosebud Sioux Tribe v. Kneip, 45 U.S.L.W. 4346, as to the jurisdiction of this case, specifically relating to the place of the accident and the parties thereto. The following directions are given for the benefit of his Honor, Judge Sorensen:

a. Only counsel for the Defendant Appawora and the State of Utah appeared in argument before this Court on July 5, 1977, and said counsel agreed that the facts relating to jurisdiction in this case could be substantially stipulated to by them, and

b. The determination of these facts should proceed with deliberate speed, and

c. The determination should be limited to the operative facts and parties in this matter.

Pre-trial Ruling

IN THE FOURTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY
STATE OF UTAH

Civil Case No. 7648

MYRON BROUGH, *Plaintiff,*

vs.

RAMON R. APPAWORA, *Defendant.*

RULING

The above matter came before the Court for Pretrial pursuant to an Order issued by the Court to counsel for the parties and other interested parties. Those represented at the proceeding were: defendant, by Scott C. Pugsley, Esq.; the State of Utah, by Richard Dewsnup and Dallin W. Jensen, Deputy Attorneys General; Dennis L. Draney, appearing in support of his application for intervention in behalf of Duchesne and Uintah Counties; and Harold C. Call, Esq., Counsel for Wasatch County. The plaintiff was not present nor was his counsel, Robert M. McRae, Esq.

The Court reviewed with counsel matters pending before the court by way of motions of the defendant to stay proceedings, and objections to petitions for intervention by the State of Utah and the counties, and the Court having heard all of the arguments of counsel relative to their positions regarding the various motions, and having fully considered same, now makes the following:

1. The Court construes the remand and direction accompanying same from the Supreme Court of the State of Utah as a direction to this Court to sit as a fact finder only, and that as such these proceedings are proceedings in the Supreme Court of the State of Utah and in aid of the appellate jurisdiction of that Court pursuant to the direction of the Supreme Court of the United States to

that court to reconsider its previous decision in light of recent United States Supreme Court decisions.

2. The authority of this Court to proceed is confined exclusively to fact finding in the areas delineated in the direction accompanying the remand, which did not grant the Court the power to permit the intervention of additional parties to this proceeding. All motions to intervene are, therefore, denied. Those seeking intervention as parties in this proceeding are directed to apply to the Justices of the Supreme Court of the State of Utah for such leave.

3. The Supreme Court has heretofore granted the motion of the State of Utah to intervene and it is a party to this proceeding and may participate as such in the fact finding process directed to be made by this Court.

4. The motion of the defendant to stay proceedings herein is denied since this Court is proceeding to enable the Supreme Court of the State of Utah to carry out the direction of the Supreme Court of the United States, and the injunction of the Federal District Court of the State of Utah entered in October of 1976 was not intended to preclude this Court from proceeding in an appropriate manner for the Supreme Court of the State of Utah to assist it in carrying out the direction of the United States Supreme Court in reconsidering its decision in the case of Brough v. Appawora.

The Court further Orders that the trial date heretofore set of 9:30 a.m., October 25, 1977, be vacated in that the parties all agreed they could not be ready to proceed at that time.

This Court further Orders counsel for the defendant, and the State of Utah to prepare and submit to the Court a Pretrial Order within thirty (30) days, the same containing all facts relative to jurisdiction which can be stipulated between the parties as to the items set forth in the proposed order heretofore submitted to counsel under date

of September 15, 1977, including the identification of all acts of Congress and the legislative history of said acts reflecting the intent of Congress in establishing and diminishing, if any, the exterior boundaries of said reservation.

The Court also directs that said Pretrial Order contain the stipulation as to the place where the defendant was served with process and in particular whether such area was on Indian trust lands.

Any other material facts relative to jurisdiction which the parties can stipulate to are directed to be contained in said Pretrial Order, and those on which there is disagreement specifically enumerated as issues to be resolved by the presentation of testimony and other evidence at the time this matter is set for hearing.

The parties to this proceeding are directed to prepare for trial of this matter before the end of December, 1977, the precise date to be announced after the Court receives the Pretrial Order above referred to.

Dated at Provo, Utah County, Utah this 4th day of October, 1977.

/s/ George E. Ballif
George E. Ballif, Judge